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Washington, D.C.

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In the Matter of)
)
Implementation of Section 309(j))
of the Communications Act)
Competitive Bidding) PP Docket No. 93-253
)
)

NOTICE OF PROPOSED RULE MAKING

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APPENDIX

Initial Regulatory Flexibility Analysis

1. On August 10, 1993, the Omnibus Budget Reconciliation Act of 1993 (Budget Act) added a new section 309(j) to the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-713 (Communications Act). This amendment to the Communications Act gives the Commission express authority to employ competitive bidding procedures to choose from among two or more mutually exclusive accepted applications for initial licenses. The Budget Act also requires the Commission to prescribe regulations to implement Section 309(j) within 210 days after enactment, or by March 8, 1994. Further, the Budget Act requires the Commission to commence issuing licenses and permits in the Personal Communications Service (PCS) within 270 days of its enactment, or May 7, 1994. We therefore initiate this expedited proceeding to comply with the Budget Act's requirements. We also propose initial application procedures and other requirements for PCS.¹

SUMMARY

2. This Notice of Proposed Rule Making implements provisions of the Omnibus Budget Reconciliation Act of 1993, which give the Commission explicit authority to use competitive bidding to award licenses for use of the radio spectrum. We propose that auctions be limited to a) mutually exclusive applications, b) initial license applications (and not renewal or modification applications), and c) radio communications services that principally use their spectrum to provide service to subscribers for compensation. Based on those criteria, we propose to exclude most mass media services and services used by public safety entities, for example, from competitive bidding.

3. However, we tentatively conclude that competitive bidding should begin immediately for Personal Communications Services (PCS), some services regulated by the Private Radio and Common Carrier Bureaus such as the Specialized Mobile Radio, Interactive Video Data Service, and certain cellular radio service applications.

4. We propose a variety of ways to meet the new law's requirement that small businesses, rural telephone companies, and businesses owned by women and minorities be given an opportunity to participate in the competitive bidding process. We ask for specific comments on setting aside blocks of spectrum for these designated groups, including a proposal to set aside a 20 MHz frequency block (Block C) and a 10 MHz block (block D) in context of broadband PCS to be licensed on a Basic Trading Area (BTA) basis. For both broadband and narrowband PCS, we also propose that these designated groups be able to pay for their licenses over time, and ask how tax certificates could be used to assist the designated groups as well.

5. We seek comment on alternative approaches for bidding, payment, deposits, safeguards, and bidder qualifications and eligibility. Further, we tentatively conclude that although we should have a broad menu of bidding methods, oral bidding should be the basic bidding method. We also seek comment on electronic bidding and sealed bidding. We ask for comment on the general concept of bidding for groups of licenses -- also known as combinatorial bidding -- and reach tentative conclusions for implementing group bidding for broadband PCS

¹ Second Report and Order, GEN Docket No. 90-314, 8 FCC Rcd ____ (September 23, 1993) ("PCS Report and Order"). First Report and Order in ET Docket No. 92-100 and GEN Docket No. 90-314, 58 Fed. Reg. 42681 (August 11, 1993).

licenses. Under group bidding, we would accept bids both for licenses individually and for all the individual licenses in the block. Licenses would be awarded as a group if a bid for the licenses as a group exceeded the sum of the highest bids for the licenses individually. If the sum of the individual bids were greater than the highest bid for the group, licenses would be awarded individually. Further, with respect to combinatorial bidding, we seek comment on providing an additional round of sealed bidding limited to winners of the first round.

6. We ask how licenses should be offered when bidding is conducted sequentially, and propose that for PCS services, the largest markets be auctioned first. We tentatively conclude that auction winners not designated by the Budget Act as deserving preferential treatment be required to pay in a lump sum upon license grant.

7. Bidding would be limited to qualified bidders. Under our preferred option, in order to participate in an auction, bidders would be required to tender in advance to the Commission a substantial upfront payment that would also serve as either the sole or an additional financial qualification in the service subject to auction. The amount of the payment would vary with the license being auctioned, and the Commission would retain the upfront payments of auction winners even if they are later disqualified.

8. The Budget Act of 1993 requires the Commission to begin licensing PCS within 270 days of enactment, and we propose to use both oral and sealed bidding in licensing broadband PCS. Oral bidding would be used in all cases except for bids on groups of licenses. For broadband PCS, we propose to permit group bidding to award all of the 51 Major Trading Area (MTA) licenses on each of two 30 MHz spectrum blocks, thereby facilitating nationwide service.

9. We ask for comment on whether this procedure should be used to facilitate grouping of PCS licenses with BTA service areas, and ask whether the Commission should accept sealed bids for all BTA licenses on an MTA basis and conduct oral auctions sequentially for individual BTA licenses. We also seek comment on the use of this combinatorial bidding to aggregate 10 MHz PCS licenses into 20 MHz or 30 MHz blocks.

10. We propose measures to prevent unjust enrichment of parties obtaining licenses via auction as well as licenses granted by lottery. We also seek comment on performance requirements to ensure prompt delivery of service and to prevent warehousing of spectrum. Finally, we seek comment on procedures to prevent collusion among bidders.

1. OVERVIEW OF THE NEW AUCTION LAW

11. Before addressing in detail provisions of the new law, we briefly describe the law's basic policies. Generally, the new legislation requires the Commission to satisfy several conditions before we may use competitive bidding to select licensees. First, there must be mutually exclusive applications that have been accepted for filing by the Commission; second, these applications must be for an initial license or construction permit; third, the license must be for a use described in Section 309(j)(2). Section 309(j)(2)(A) provides that competitive bidding may apply to a particular use of the electromagnetic spectrum if the Commission determines that

(A) the principal use of that spectrum will involve, or is reasonably likely to involve, the licensee receiving compensation from subscribers in return for which the licensee

- (i) enables those subscribers to receive communications signals that are transmitted utilizing frequencies on which the licensee is licensed to operate; or
- (ii) enables those subscribers to transmit directly communications signals utilizing frequencies on which the licensee is licensed to operate.

12. Further, under Section 309(j)(2)(B), the Commission must determine that use of a system of competitive bidding will promote the objectives described in Section 309(j)(3), which, in addition to those in Section 1 of the Act, are

- (A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;
- (B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;
- (C) recovery for the public of a portion of the value of the public spectrum made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource; and
- (D) efficient and intensive use of the electromagnetic spectrum.

13. In addition, Subsection (j)(3) requires that the Commission, in identifying classes of licenses and permits to be assigned by competitive bidding, include safeguards to protect the public interest in the use of the spectrum. Under Subsection (j)(4) of the statute, the Commission, when promulgating bidding regulations, must also:

- (A) consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods that promote the objectives described in paragraph (3)(B), and combinations of such schedules and methods;
- (B) include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services;
- (C) consistent with the public interest, convenience, and necessity, the purposes of this Act, and the characteristics of the proposed service, prescribe area designations and bandwidth assignments that promote (i) an equitable distribution of licenses and services among geographic areas, (ii) economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women, and (iii) investment in and rapid deployment of new technologies and services;
- (D) ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax

certificates, bidding preferences, and other procedures; and

(E) require such transfer disclosures and antitrafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits.

14. In making the spectrum allocation decisions and in prescribing regulations under Section 309(j)(4)(C), the Commission is not permitted to base a finding of public interest, convenience, and necessity on the expectation of Federal revenues that would result from the use of competitive bidding. See Section 309(j)(7). Further, in Section 309(j)(3), Congress encouraged the Commission to design multiple alternative methodologies for competitive bidding.

15. There are a number of conditions precedent and conditions subsequent to the Commission's use of competitive bidding authority. Section 309(j)(10) requires that, before we may begin to license by competitive bidding, the Secretary of Commerce must have submitted a report on the reallocation of certain governmental frequencies and that report must contain certain findings. Also, prior to using competitive bidding, the Commission must have completed the rule making required by new Section 332(c)(1)(D) on the licensing of personal communications services.

16. Under Section 309(j)(10), our authority to issue licenses using competitive bidding will terminate after two years if the Secretary of Commerce, the President, or the Commission fail to take certain actions on a timely basis. Competitive bidding authority expires on September 30, 1998 in any event.

17. Finally, the new law provides that the Commission may not issue any license or permit by lottery after the date of enactment unless the spectrum's use is not a type for which auctions are permitted (as described in Section 309(j)(2)(A)), or, the application was accepted for filing before July 26, 1993. See Section 6002(c) (Special Rule). Under the Budget Act, therefore, mutually exclusive applications accepted for filing after July 26, 1993 may not be granted by lottery until the Commission determines whether the applicable radio service is not subject to competitive bidding under Section 309(j)(2)(A).¹

II DISCUSSION

A. General Approach to Implementing Legislation

18. We propose certain broad design criteria furthering the goals mandated by Congress in order to develop rules to implement a system of competitive bidding. First, especially given the very short time within which we are required to implement competitive bidding regulations and initiate licensing of PCS, any system that we promulgate should be simple and easy to administer. Unnecessary complexity in conception or execution is likely to cause delay and frustrate Congress's intent to speed new services to the public. Second, inasmuch as the Commission has no experience in conducting spectrum auctions, we anticipate relying heavily on the experience of other government agencies who have successfully conducted auctions. Third, we seek systems of competitive bidding and associated rules that minimize costs to applicants and the Commission.

19. Further, we hope to implement general rules and regulations for competitive bidding that could apply to a variety of services and offerings. In this regard, we propose to

establish a new subpart to Part I of our Rules that would apply to competitive bidding generally. We see two possible ways in which we might amend our rules to accommodate the new process. First, we might propose a particular auction methodology to be applied for each service which we would auction. Second, we might propose to establish a variety of auction procedures in our rules, request comment in this proceeding as to the general appropriateness of particular types of auction procedures in various circumstances, and then choose from among the procedures as we announce individual auctions. Because as yet we have no actual experience with auctions, we think such rules should afford the Commission broad flexibility to select from among the procedures as it deems appropriate for individual services. Given that we intend to begin auctions of some services before others and in view of the limited time we have to conclude this proceeding, we tentatively conclude that the second course would be preferable. We also believe that this course would more closely comply with the Congressional directive that we "design and test multiple alternative methodologies under appropriate circumstances." See Section 309(j)(3). We might announce the auction method(s) for a particular service by Commission order, Bureau order, or Public Notice, and request comment on the appropriate means of doing so.

20. Although we propose to design general auction rules, we also propose applying these new rules to certain specific services immediately, including broadband and narrowband Personal Communications Services (PCS), all common carrier radio services, the Specialized Mobile Radio service, and the Interactive Video Data Service. We therefore seek comment not only on whether these general design criteria serve the public interest, but also on the ways in which we propose to conduct competitive bidding for those services such as PCS that we hope to license quickly.²

B. Principles for Determining Whether a License Should be Auctioned

21. Although both the legislation and the Conference Report are silent on this point, the House Report states at 254 that the Commission is expected to determine "auctionability" when a service or class of service is defined by the Commission or, if the service already exists, the Commission is to determine whether the service meets the test set forth in Section 309(j)(2). H.R. Rep. 111, 103d Cong. 1st Sess. 254 ~~Sess. 254~~ (1993) (H.R. Rep. No. 103-111). We propose to use the services as currently defined by the Commission to conduct the review contemplated by Congress, and to identify those services that we tentatively conclude should be excluded from or subject to competitive bidding. We request comment on these tentative conclusions. Before conducting a service by service review, however, we shall discuss in greater detail the general criteria that must be met before competitive bidding is possible.

i. General Requirement for Mutual Exclusivity Among Applications for Initial Licenses or Construction Permits Accepted for Filing

22. By its terms, Section 309(j) only permits auctions if mutual exclusivity exists among applications that have been accepted for filing. Therefore, if mutual exclusivity among such applications does not exist, a license is not subject to competitive bidding.³ We propose to incorporate this standard into our rules. Congress's use in Section 309(j)(1) of the term initial

² We are confident that the conditions precedent to the Commission's exercise of competitive bidding authority will be satisfied and will proceed on that basis.

³ In many services regulated by the Private Radio Bureau, mutual exclusivity cannot exist because the channels are shared by numerous licensees. Thus, no license would be denied on the basis of mutual exclusivity. See paras. 131-146, *infra*.

license or construction permit indicates that renewal licenses or permits are to be excluded from the competitive bidding process. See H.R. Rep. No. 103-111 at 253. It also does not appear that Congress expected that applications to modify existing licenses would be subject to competitive bidding.⁴ We propose to confirm in our rules that neither renewal nor modification applications would be subject to competitive bidding.

ii. General Requirement of Subscribers

23. The next major criterion for competitive bidding is that the licensee have paying subscribers. The legislative history in H.R. Rep. No. 103-111 at 254, incorporated by reference in the Conference Report, makes clear that traditional over-the-air broadcast services would not be subject to competitive bidding (there being no subscriber fee).⁵ Therefore, we propose to exclude from the competitive bidding process the following classes of licenses which provide broadcast services and request comment on our proposal:

a. Broadcast television (VHF, UHF, LPTV)

b. Broadcast radio (AM and FM)

We seek comment, however, on other mass media services that might be subject to competitive bidding (e.g., Direct Broadcast Satellite)⁶ and specifically request that comments address how the statutory criteria for competitive bidding may apply to such services.

iii. "Private Services" Excluded

24. The term "private services" used in the legislative history refers solely to services that do not involve the receipt of compensation from subscribers. More specifically, portions of the House Report, which are incorporated by reference in the Conference Report, state that the enactment of competitive bidding authority

should not affect the manner in which the Commission issues licenses for virtually all private services, including frequencies utilized by Public Safety Services, the Broadcast Auxiliary Service, and for subcarriers and other services where the signal is indivisible from the main channel signal.

⁴ See H. R. Rep. No. 103-111 at 253; cf. *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551 (D.C. Cir. 1987).

⁵ H.R. Rep. No. 103-111 at 253-254 also notes that the fact that some television licensees may receive compensation from cable television operators as a result of the enactment of the "retransmission consent" provisions of the Cable Act should have no effect on the Commission's licensing of television stations. Similarly, the Conference Report at 481-82 makes clear that Instructional Television Fixed Service (ITFS) is not to be subject to competitive bidding even if ITFS licensees receive payments from Multichannel Multipoint Distribution Service licensees for the use of ITFS spectrum.

⁶ See 47 C.F.R. § 100.3; See also Implementation of Section 25 of the Cable Television Consumer Protection Act of 1992, 8 FCC Rcd 1589 (1993). Commenters should note that DBS construction permits have been issued and several permittees have already received transponder assignments.

H.R. Rep. No. 103-111, at 253. It seems clear that in using the words "private services" in this manner, Congress did not intend the same meaning that the Commission has ascribed to them in other contexts. For example, the Private Radio Bureau regulates certain private land mobile services that do involve the receipt of compensation from subscribers, which could presumably be subject to competitive bidding. On the other hand, certain services identified by Congress as "private", e.g., Broadcast Auxiliary Services, have never been classified as private radio services as that term is understood and used by the Commission in its Rules.

25. It is also clear that the words "private services" are not the same as the term "private mobile service" as that term is defined in new Section 332(d)(3) as added by Section 6002 of the Budget Act. The distinction between "private mobile service" and "Commercial Mobile Service" in Section 332 turns on several criteria that are not relevant to Section 309(j), e.g., whether the service is interconnected to the public switched network and provided to a substantial portion of the public. See also Implementation of Sections 3(n) and 332 of the Communications Act-Regulatory Treatment of Mobile Services, GN Docket No. 93-252, adopted September 23, 1993 ("332 Rule Making"). Thus, it appears that a service could be classified as a private mobile service for purposes of Section 332 but not be deemed "private" for purposes of Section 309(j). In determining which services are subject to competitive bidding, we intend to use the term "private services" to mean services that do not involve the receipt of compensation from subscribers and, hence, are outside the scope of Section 309(j)(2)(A). We request comment on our analysis.

26. Therefore, and as described more fully below, we propose that initial applications for spectrum in the common carrier fixed services, the new Commercial Mobile Services, certain private mobile services established by Section 332, and certain other services regulated by the Private Radio Bureau generally be subject to competitive bidding. Traditional common carriers have subscribers: by definition their services are offered indifferently to the public for hire.* We also propose that the new category of Commercial Mobile Service providers established by and defined in Section 6002, which involves subscribers and compensation, should likewise be subject to competitive bidding.⁹ By contrast, the statute seems to exclude virtually all of those services which were "private services" in the sense that they did not involve the payment of compensation to the licensee by subscribers. Therefore, we propose that initial applicants for spectrum used principally for internal uses and not for services to subscribers be exempted from competitive bidding.

27. As a result of this analysis, some of the services now regulated by the Private Radio Bureau could be subject to competitive bidding, while others would not. In some cases, entire services, classes of licensees or permittees who use their licenses for "private services"

With this in mind, we propose that frequencies allocated to the Broadcast Auxiliary Services under Subparts D, E, F and H of Part 74 of our Rules be exempted from competitive bidding. We also propose that subcarrier-based and similar services, such as Vertical Blanking Interval, be exempted from competitive bidding where the underlying service is exempt. See H.R. Rep. No. 103-111 at 253. See also discussion of Public Safety entities, *infra*.

* Section 3(h), Communications Act, 47 U.S.C. § 153(h), Memorandum Opinion and Order, Docket No. 18262, 51 FCC 2d 945, 959 (1975), aff'd sub nom. NARUC v. FCC, 525 F.2d 630 (D.C. Cir.), cert. denied 425 U.S. 992 (1976).

⁹ Commercial Mobile Service, as defined by Section 332, is a "for-profit" service and is treated as common carriage under Title II of the Act. 47 U.S.C. §§ 332(c)(1)(A) and (d)(1).

within the meaning the Section 309(j), such as the Amateur Radio Service, which is regulated under Part 97 of our Rules, would be excluded from auctions. In other cases, certain subclasses or subservices, such as the Specialized Mobile Radio (SMR) providers, who are part of the private land mobile service, might be subject to auctions while other subclasses of private land mobile service applicants might not be. We expand further on our proposal below.

iv. Intermediate Links

28. For some services the test of whether certain spectrum should be subject to competitive bidding requires further analysis. Some common carriers, for example, offer point-to-point microwave service as a common carrier offering. Such spectrum, it seems, would be subject to competitive bidding if the other criteria, such as mutual exclusivity, were met. Other common carriers utilize microwave as part of an end-to-end service offering, as when a cellular carrier transmits subscriber traffic between cell sites and its Mobile Telephone Switching Office, or a local exchange telephone company uses microwave as one means of transmitting local exchange telephone service. Similarly, cable television companies often utilize point-to-point microwave to transmit television programming to different points within or among systems although not directly to their subscribers.¹⁰

29. Section 309(j)(2)(A) requires, in order for there to be competitive bidding, that the subject spectrum enable subscribers "to receive communications signals" or to "transmit directly communications signals." It seems that the aforementioned examples would fall within this criterion: the microwave licenses are used as an integral part of an end-to-end service offering enabling paying subscribers either to transmit directly or receive communications signals utilizing frequencies on which the licensee is licensed to operate. We therefore propose that licenses used in services as an intermediate link in the provision of a continuous, end-to-end service to a subscriber would be subject to competitive bidding.¹¹ Such a result would also be administratively efficient because it would eliminate the necessity of determining the nature of the use being made of a particular license. We request comment on this proposal. In particular, commenters are requested to address the practical ramifications of this proposal on the internal operations or expansion of their existing businesses. Further, commenters should address the number of situations where mutual exclusivity could arise in this context.

v. Principal Use Requirement

30. In order for competitive bidding to apply, Section 309(j)(2) requires that the principal use of that spectrum must involve, or be reasonably likely to involve, the transmission or reception of communications signals to subscribers for compensation. There are a number of services, such as the private operational fixed service (POFS) licensed under Part 94 of the Rules, where the licensee may either provide service to itself only or may offer communication service to subscribers for compensation, or may provide service to itself as well as to subscribers

¹⁰ Contrast such use of the spectrum for these Community Antenna Relay Services (CARS) with so-called "wireless cable" companies, which do use the airwaves to transmit programming directly to their subscribers.

¹¹ In this regard, as noted, the CARS would be eligible for competitive bidding inasmuch as cable television systems do have paying subscribers. Commenters should address the extent to which CARS frequencies are used for internal operations for a cable system, and whether such internal uses dictate treatment similar to that proposed, for example, for the Private Operational Fixed Service frequencies discussed at paras 30-32, and in Section IV. infra

31. Congress apparently recognized the existence of such mixed use services, for Section 309(j)(3) speaks in terms of identifying the "principal use" of spectrum.¹² It also speaks in terms of identifying classes of licenses and permits to be issued by competitive bidding.¹³ Therefore, we propose to identify classes of licenses and permits to determine "principal use," rather than individual licenses that are potential candidates for competitive bidding. Although, in theory, we could examine individual applications to determine their principal use, this would be virtually unworkable because of the heavy administrative burden such determinations would place on the Commission. We seek comment on our proposal.

32. In order to determine whether competitive bidding may be used, we propose that at least a majority of the use of a Commission regulated service or class of service must be for service to subscribers for compensation rather than for "private service."¹⁴ If the principal use of a service or class of service, either by average users or by the majority of users within a service, is for "private service" (i.e., services without paying subscribers), then that entire service or class of service would be exempted from competitive bidding. Our long experience in regulating these services allows us to draw some tentative conclusions as to the primary use of these service classes. We therefore propose to tentatively classify services, or in a few cases, subsets of services, for their auctionability as discussed below.¹⁵ We request comments that would support or challenge our tentative conclusions as to the nature of these services. Thus, in the above example of the POFS, we would compare the amount of "private service" use made by POFS licensees as a class with the amount of POFS use rendered to eligible subscribers for

¹² See 47 U.S.C. § 309(j)(3); H.R. Rep. No. 103-111 at 254 (Section 309(j)(2) determination to be made when a service or class of service is defined by Commission).

¹³ Id.

¹⁴ We could measure or estimate, based on historical experience, the extent of private or internal use by comparing the amount of information throughput for private or internal purposes, without compensation of any kind, with the amount of information throughput for which compensation of any kind is received by the service or subservice's entire class of licensees. Alternatively, we might measure (or estimate) the amount of time or the amount of spectrum that is devoted to each use. We request comment on the advantages and disadvantages of these alternatives.

¹⁵ As discussed below with respect to General Category channels and channels obtained through intercategory sharing, however, we may determine that the public interest requires that competitive bidding not be used in some circumstances even if services might satisfy that requirement. See Section 309(j)(3). We also recognize that the principal use test may create incentives for applicants to structure their service offerings in order to avoid competitive bidding. We intend to scrutinize any such developments and take steps to deal with such behavior, such as reclassifying services or service categories, if and when it occurs.

compensation.

33. Alternatively, if there is any use, no matter how minimal, in which one or more licensees within a given service or classification of service uses that spectrum for the provision of service to subscribers for compensation, we ask whether that entire service or class of service should be subject to competitive bidding. Such a result could be administratively convenient but could also lead to inequities for certain classes of licensees who may not use any license they would acquire for the provision of service to subscribers for compensation. Police departments and local governments as well as private corporations, such as railroads or investor-owned utility companies using their licenses for purely internal communications purposes, for example, might have to bid against SMRs for spectrum on "contaminated" bands. We seek comment on whether this apparent difficulty might be resolved by exempting only public safety entities from competitive bidding. We also believe that this approach may lead to results that are inconsistent with Congressional intent that a service, to be subject to auctions, must be used "principally" for subscriber services.¹⁶

III. AUCTION DESIGN

34. In this section we discuss the design of alternative auction methods that promote the objectives specified in Section 309(j)(3) of the Act and the broad goals put forth in the introductory discussion above.¹⁷ As a general matter and consistent with Sections 309(j)(3)(A) and (D), we seek a bidding system that awards licenses to the eligible parties that value them the most within the guidelines set by Congress. Absent market failures, the parties that value licenses the most should generally best serve the public and make rapid and efficient use of the spectrum.¹⁸

¹⁶ In our experience, the vast majority of use of the POFS is for private or internal use by the licensee or its affiliates for which no compensation of any kind is paid. We anticipate that the POFS would be excluded from competitive bidding under this analysis and request comment on our tentative conclusion.

¹⁷ In a very few instances, the Commission has granted waivers to permit common carrier use of frequencies regulated by the Private Radio Bureau or vice versa. These waivers are sufficiently rare that we believe they will have no material impact on the classifications we propose. We request comment on our tentative conclusion.

¹⁸ See also the discussion of the General Category channels in Section IV, *infra*.

¹⁹ This section draws on a framework developed in 1984-85 at the U.S. Department of the Interior for improving the design of Federal coal lease auctions. This framework includes a comprehensive set of auction design criteria and a breakdown of the auction process into basic design elements that can be modified individually. See Donald J. Bieniewicz, DESIGN ELEMENTS OF A BONUS-BID AUCTION, Office of Policy Analysis, U.S. Department of the Interior, presented at the TMS/ORSA Joint National Meeting, Washington, D.C. (April 26, 1988).

²⁰ We believe that appropriate safeguards generally can be designed to prevent significant market failures, while awarding licenses to the parties who value them the most. For example, government-provided financing of licenses (through special payment schedules) could mitigate the effects of undue discrimination against small businesses in private capital markets. In some cases, however, eligibility restrictions, *i.e.*, excluding parties who are potentially the highest

If the auction process does not award a license to the party who values it the most, the license ultimately will be resold to that party, assuming transactions costs are low and resale is permitted.²¹ But, contrary to Sections 309(j)(3)(A) and (D), the provision of service to the public may be delayed and the public would receive less revenue than if the auction initially awarded the license to the party willing to pay the most.²²

35. Consistent with the statute, we also seek to implement an auction system that facilitates the efficient aggregation of licenses where appropriate. Combining certain licenses across spectrum and geographic areas will reduce costs and promote the provision of higher valued services. If the auction system does not provide for such aggregation, most of it will occur eventually in the aftermarket. But such aftermarket transactions are likely to be more costly, especially if there are holdouts, and service to the public may be delayed, contrary to the statutory objective. Moreover, a substantial portion of the gain from combining licenses will then be reaped by traders in the aftermarket instead of by the public. In light of the economic opportunity safeguards proposed in this notice and the Commission's existing limitations on total spectrum holdings within a market, we believe that, with appropriate safeguards, our auction process is likely to produce a level of license aggregation that will not compromise the Congressional objectives of promoting economic opportunity and competition.

A. Bidding

36. **Alternative Bidding Methods.** There are four basic auction methods: oral ascending bid (English), sealed bid, descending bid (Dutch) and sealed second-bid (Vickrey).²³ The oral bid and sealed bid are the most common. Combinations of these four methods, such as

bidders, may be an appropriate safeguard to promote economic efficiency and the statutory objectives in Section 309(j)(3). For example, the Commission may wish to limit the concentration of licenses within each geographic market to prevent abuse of market power. The fact that a monopolist in a market would be willing to pay the most for a second license does not indicate that it would best serve the public. Finally, restrictions may be an appropriate means of addressing the statutory objectives in Section 309(j)(3)(B). Of course, a policy to set aside certain licenses only for some designated group of applicants may exclude the bidders who value the licenses the most.

²¹ This has been the experience in licensing cellular service by lottery. The Commission divided the U.S. and territories into 734 cellular service areas and allocated two frequency blocks, block A (non-wireline) and B (wireline, i.e., limited to local telephone companies with a presence in the cellular service area). Comparative hearings were used to select among mutually exclusive applications in the top 30 markets, while lotteries were used in the remaining markets. As of March 1993, 70 percent of all cellular licenses and 85 percent of non-wireline licenses had been the subject of at least one non pro-forma transfer of control. Thus most of the current cellular licensees ended up buying their licenses at market prices.

²² The delay and loss of revenue is illustrated by the Commission's experience with lotteries, which are unlikely to award licenses to the parties that value them the most. For example, lottery winners of the rural cellular licenses for Columbia County, Wisconsin, sold it for \$62.3 million in 1990, 165 days after a construction permit was issued. The public received none of this revenue, except for possible tax payments.

²³ R. Preston McAfee and John McMillan, Auctions and Competitive Bidding, 25 *Journal of Economic Literature* 699-738 (June 1987).

permitting the submission of sealed bids in oral auctions, are also possible.

37. Under oral bidding the asking price is raised until a single bidder remains. The item is awarded to the highest bidder at the bid price. Oral bidding has several advantages. First, oral bidding is likely to assign a license to the party who values it the most. Assuming bidders do not collude, the party with the highest willingness to pay would ultimately outbid all other parties in an oral auction. The price the high bidder would pay would be approximately the value placed on the item by the bidder with the second highest willingness to pay. Second, if licenses are offered individually, aggregation is likely to be easier under oral bidding than sealed bidding. Under oral bidding, a bidder willing to outbid all competitors can be assured of acquiring any group of licenses. A third advantage of oral bidding is that it may have lower private costs than sealed bidding or a Dutch auction because it does not require estimation of the value other bidders place on the item. Finally, oral bidding is likely to be perceived as fair because the process is open, and any eligible and qualified bidder who is willing to pay enough can be assured of winning.

38. A disadvantage of oral bidding is that it may be more subject to manipulation than sealed bidding when there are few bidders. The most serious form of manipulation takes place when parties get together before the auction and agree on who will win.²⁴ Such collusion reduces the return since the party designated to win could bid well below the value of the item without fearing that it would be outbid. To address this concern, the Commission may wish to propose rules against collusion. (See discussion below.)

39. A variant of the ascending bid oral auction is electronic bidding conducted in real-time. Bids would be submitted electronically by telephone or computer terminals and announced within some short time period. Minimum bid increments would be set. Bidding would end at some predetermined time or after some set period of time had lapsed since the last bid. Such a system has been proposed for auctioning Treasury securities.²⁵ This method could be used to conduct simultaneous ascending bid auctions, which are discussed below.²⁶

40. In a sealed bid auction the high bidder would be awarded the item and pay the amount bid.²⁷ Sealed bidding is simple to administer and less subject to manipulation by bidders

²⁴ Marc Robinson, Collusion and the Choice of Auction, 16 Rand Journal of Economics 141 (Spring 1985).

²⁵ Vincent Reinhart, THEORY AND EVIDENCE ON REFORM OF THE TREASURY'S AUCTION PROCEDURE, Federal Reserve Board, Washington, D.C. (March 1992).

²⁶ Real time ascending bid auctions could also be conducted by other means such as open written bids. This system is commonly used in charity "silent" auctions.

²⁷ We seek comment on whether bidders should be permitted to submit more than one bid per license. Bidders might have an incentive to do so if, as proposed below, they are not required to include a deposit with each bid. If multiple bids were permitted on the same license and bidders could choose to decline any bid without cost after all bids are opened, the auction would seem equivalent to a sealed second-bid auction. Bidders would submit bids in increments with the highest bid equal to the maximum amount they are willing to pay. The bidder with the highest bids would decline all bids above the maximum amount offered by the next highest bidder. While the outcome might be the same as a sealed second-bid auction this method could generate huge numbers of applications and have the appearance of manipulation. On these

than an oral auction. For example, collusion is less likely under sealed bidding because the colluders run a higher-risk of losing the auction to a firm not participating in or reneging on an agreement. A breach of agreement would not be discovered until the bidding was closed. Any retaliation against such a firm would need to either take place outside of the auction process or wait until the next auction.

41. A disadvantage of a standard sealed bid auction is that it may not award the item to the party who values it the most. In sealed bid auctions bidders would shade their bids below the maximum amount they are willing to pay in order to avoid paying more than necessary to win the auction. Generally, a bidder's objective is to make its winning bid only slightly more than the next highest bid. Since in a sealed bid auction, bidders do not know precisely how much other parties will bid, it is possible that the bidder with the highest willingness to pay may not submit the highest bid. Thus it is less likely under sealed bidding than under oral auctions that licenses would be awarded initially to the parties who value them the most.

42. In a Dutch auction the auctioneer gradually lowers the price until a bid is offered and the item is awarded at that price. A bidder can make only a single offer not knowing what other bidders are willing to pay and the item is awarded to the highest bidder at the price bid. Thus, in theory the optimal bidding strategy in a Dutch auction is the same as in sealed bid auction.²⁸ In laboratory bidding experiments, however, Dutch auctions tend to result in lower bids than sealed bid auctions.²⁹ Finally, as with a sealed bid auction, Dutch auctions may not award an item to the party who values it the most, even when bidding is only for a single item. We see no advantage to Dutch auctions and tentatively conclude that they should not be used under any circumstances.

43. In a sealed second-bid auction the high bidder is awarded the item but pays the second highest bid (the highest losing bid). The same concept can be applied to the sales of multiple homogeneous items. In that case the seller chooses the highest set of bids that exhausts the total number of items for sale, but all successful bidders pay the same price -- the highest losing bid. This method has been used on an experimental basis in auctioning U.S. treasury securities.³⁰

44. Sealed second-bid auctions combine certain advantages of sealed first-bid and oral auctions. As in oral auctions, second-bid auctions award an item to the party who values it the

grounds we tentatively conclude that bidders should be permitted only one bid per license. If the Commission determines that under certain circumstances a sealed second-bid auction is appropriate, it would be better to use it directly than introduce it in this way. We note that the limitation would not bar simultaneous bidding on licenses individually and those licenses offered as part of a group.

²⁸ William Vickrey, "Counterspeculation, Auctions, and Competitive Sealed Tenders," *Journal of Finance* 8 (March 1961). See also Paul Milgrom, *Auctions and Bidding: A Primer*, 3 *Journal of Economic Perspectives* 6 (Summer 1989) (hereinafter Milgrom).

²⁹ See Milgrom at 7.

³⁰ In September 1992 the Treasury Department began a one-year experiment with single-price auctions. *The Washington Post*, Section H, page 11 (September 13, 1992).

most.⁴¹ And it is relatively resistant to collusion, as are first-bid sealed auctions. A third advantage is that under standard assumptions, second-bid auctions induce bidders to reveal the maximum amount they are willing to pay.⁴² As discussed below, this would be useful when using auctions to determine whether to issue licenses individually or as a package.

45. Nevertheless, second-bid sealed auctions are rarely used. One possible reason for this is that such auctions may reveal a large gap between the amount the winning bidder is willing to pay and what is actually paid.⁴³ Another difficulty is that bidders may be reluctant to reveal their maximum willingness to pay for fear that this information may subsequently be used to their detriment by competitors, suppliers, unions, or the government.⁴⁴ Finally, this approach is generally perceived as being more complex than standard sealed or oral auctions. In light of these difficulties we question whether sealed second-bid auctions should be used in any circumstances but seek comment on this method because of its unique theoretical advantages.

46. Proposed Bidding Methods. Given these alternatives, we tentatively conclude that oral bidding should be the Commission's basic auction method and thus recommend its use when the Commission does not explicitly specify some other method. In making this tentative conclusion, we find that the benefits of oral auctions are generally more likely to outweigh the costs of this method as well as the net benefits of the other auction methods considered. Oral bidding is likely to award licenses to the parties that value them the most and facilitate efficient aggregation of licenses when non-homogeneous licenses are offered individually. Moreover, the main disadvantage to oral auctions is the potential for collusion, which we believe can be safely addressed by the measures set forth below.

47. Oral bidding should not, however, be the only auction methodology available to the Commission. New section 309(j)(3) of the Act states that the "Commission shall seek to design and test multiple alternative methodologies under appropriate circumstances." It is our intention to do so. For example, when licenses are offered alternatively as part of a group or

⁴¹ See Milgrom at 8.

⁴² Because in a second-bid auction the price paid is independent of one's bid, the bidder's situation is analogous to asking someone else to buy an item in the store as long as the price is less than some amount. The optimal strategy is to tell the shopping agent the maximum amount you would be willing to pay for the item. If you understated your willingness to pay the agent might return without the item even though the price was less than what you would be willing to pay. If you overstated your willingness to pay the agent might purchase it for more than it was worth to you. Thus the optimal strategy is to tell the truth. See Milgrom, p. 8.

⁴³ In New Zealand, for example, Telecom Cellular bid NZ \$7 million for a cellular license but paid only NZ \$5,000, the second highest qualifying bid. In an oral auction the amount Telecom paid would likely have been about the same, but the amount that it was willing to pay would not have been revealed. Such disparities between the first and second bid undermined public confidence in the process and led New Zealand to drop sealed second-bid auctions in favor of standard first-bid sealed auctions. See Milton Mueller, Reform of Spectrum Management: Lessons from New Zealand 13 Policy Insight 20 (Reason Foundation, November 1991).

⁴⁴ Michael H. Rothkopf, et al., Why Are Vickrey Auctions Rare? 98 Journal of Political Economy 94-109 (1990).

individually, as we propose below for certain PCS licenses, we tentatively conclude that sealed bids be taken for licenses as part of a group and oral bids taken for individual licenses. Sealed bids would be submitted prior to oral bidding, and would not be opened until the conclusion of the oral bidding. As discussed below, such a system would avoid the problems that may arise if parties bidding on licenses as a group know the results of bidding on licenses individually or vice versa.

48. When multiple homogeneous licenses are offered, we tentatively conclude that the Commission should experiment with sealed (or electronically filed) bidding methods used by the U.S. Treasury to auction securities. We seek comment on whether in this case each bidder should pay the bid price or a single price equal to the highest losing bid. We also seek comment on our tentative conclusions on bidding methods, as well as whether, and under what circumstances, the Commission should use other bidding methods or variants of the methods discussed here.

49. In those cases when the Commission expects very few bidders we propose to use sealed bid auctions. We tentatively conclude that this approach would minimize the risk of bidder collusion.

50. Finally, we request comment on the use of the Small Business Advisory Committee (SBAC) -proposed "innovator's bidding preference."³⁵ The credit is intended to encourage participation by designated entities, and by strategic small business alliances, by awarding credits equal to 10 percent of an applicant's bid. To the extent the credit is based on technological innovation, we seek comment on whether it is feasible to expeditiously determine eligibility for such credits prior to an auction.

51. **Sequence of Bidding.** In oral auctions, licenses would be offered sequentially. Electronic auctions could be conducted sequentially or simultaneously. Sealed bid auctions could be held either sequentially or parties could be allowed to bid simultaneously on some or all licenses. Under sequential bidding the amount bid in later rounds can reflect what licenses have been acquired in earlier rounds. This is likely to be better than sealed simultaneous independent bidding in facilitating the efficient aggregation of licenses. The main drawback of sequential bidding is the delay if used to award large numbers of licenses, especially by sealed bid.

52. If bidding is done sequentially the order in which items are offered can affect the outcome. We seek to establish the sequence of bidding that is most likely to facilitate economically efficient aggregation of licenses across geographic regions and spectrum blocks while complying with the statute. One approach would be to auction all geographic regions within a spectrum block before proceeding to auction the next spectrum block. This approach is likely to be best when aggregation across geographic areas is more important than aggregation across spectrum blocks. This would be the case when the geographic scope of licenses is small relative to the efficient geographic scale while the bandwidth per license is sufficient to achieve the minimum efficient scale of operation. Another option would be to auction all blocks in a given geographic area before proceeding to auction licenses in the next geographic region. This approach would be best when bandwidth per license is small and geographic scope large such that aggregation of licenses in the same geographic area is likely.

³⁵ See FCC Small Business Advisory Committee to the Federal Communications Commission Regarding Gen. Docket 90-314 (September 15, 1993) (SBAC Report) at 14-15 (which has been included in the docket of this proceeding and is available from the Commission on request).

53. When licenses are offered sequentially within a given spectrum block, one option would be to offer the regions in descending order of population. This would enable firms seeking to create regional service areas to acquire the largest market in the region before bidding on smaller surrounding markets. Presumably the value of a small market adjacent to a large market is more dependent (in percentage terms) on whether one also holds the large market than the converse. Thus it would seem more useful to most bidders to know which big markets they had won before bidding on smaller markets. Another option would be to offer licenses by large geographic regions. For example, the Commission might first offer all licenses in the eastern section of the country, and offer licenses within that area in descending order of population. This approach might facilitate aggregation by large geographic regions. If an oral auction is used, the Commission might hold the auctions within the large geographic area that is being licensed.

54. The preferred sequence of offering across spectrum blocks is less clear. One option would be to auction blocks in descending order of bandwidth, e.g., offer 30 MHz licenses before 20 MHz licenses. We seek comment on the circumstances in which alternative sequences of bidding would be most likely to result in an efficient aggregation of licenses and best meet the Commission's other auction design objectives.

55. When bids are taken simultaneously for all items in a sealed bid auction the order in which bids are opened typically does not matter. However, as discussed below, the order does matter when bidders are permitted to place a ceiling on the total amount they wish to spend, or if bidders can withdraw bids when the sealed bids are opened. In these cases the order of opening bids must be specified in advance. If spending limits are adopted or if bids can be withdrawn without penalty, a reasonable option would be to open bids for licenses in descending order of market size as measured by population. We seek comment on this and other options for the order of opening sealed bids.

56. We also seek comment on the advantages and disadvantages of simultaneous ascending bid electronic auctions. Under this approach, multiple licenses would be put up for bid at the same time. Such auctions may facilitate the efficient and rapid aggregation of licenses by providing bidders with simultaneous information about the value of licenses in multiple markets. This technique has not been widely used, however, and may take longer to implement than the other bidding methods. We specifically ask for comment on the feasibility of implementing it in time to meet the statutory deadlines for commencing PCS licensing.

57. **Bidding for Groups of Licenses.** Allowing bids for both individual licenses and groups of licenses ("combinatorial bidding") may reduce the transactions costs in efficiently aggregating licenses.³⁶ Bidding on individual licenses, even sequentially, does not allow bidders to fully express the interdependence of license values and does not ensure that groups of licenses are assigned to their highest valued use.³⁷ One way to facilitate efficient aggregation is to allow bidding for groups of licenses that are likely to have more value as a package than individually. For certain spectrum blocks we could accept bids both for licenses individually and for all the

³⁶ See Letter of the Honorable John D. Dingell, M.C. to the Honorable James H. Quello, Chairman, Federal Communications Commission (September 21, 1993) (a copy of which has been included in this docket and is available to the public).

³⁷ For example, with sequential bidding a firm's bid in the early rounds would not be able to reflect whether the firm was able to acquire contiguous licenses in later rounds. John Riley and William Samuelson, Optimal Auctions, *American Economic Review* 389 (June 1981) (hereinafter "Riley and Samuelson").

individual licenses in the block. Licenses would be awarded as a group if a bid for the licenses as a group exceeded the sum of the highest bids for the licenses individually. If the sum were greater than the highest bid for the group, licenses would be awarded individually. In either case, the same eligibility, performance and other requirements would apply to each individual license.

58. We tentatively conclude that in the initial application of combinatorial bidding the Commission should require submission of sealed bids for groups of licenses and then conduct oral auctions for individual licenses. We believe that this avoids providing an undue information advantage to bidders for a group of licenses. The alternative of first auctioning licenses individually, announcing the results, and then offering licenses in groups would permit bidders for a group of licenses to outbid the announced aggregate bid for single licenses without permitting a counteroffer. This might bias the outcome in favor of group licenses.

59. We also tentatively conclude that bidding for groups of licenses should be by sealed bid and that the bids should not be opened until after completion of oral bidding for individual licenses. If it became apparent that a bid for a group of licenses was likely to exceed the sum of the individual bids, bidding would virtually cease for the remaining individual licenses.

60. A possible refinement to the proposed procedure for implementing combinatorial bidding would be to provide for an additional round of bidding limited to winners of the first round. Winners of the first round would be given an opportunity to increase³⁹ their bids by submitting a sealed "final and best" offer. Licenses would be awarded as a group if the final bid for the licenses as a group exceeded the sum of the final bids for licenses individually. Winners would pay the prices bid in the final round. Such an additional round of bidding would allow for a counter offer by the parties who won in the first round but were not awarded a license in the first round under the combinatorial bidding rule.

61. We seek comment on the general concept of combinatorial bidding,⁴⁰ on our tentative conclusions for implementation and on possible refinements. We also specifically seek comment on the Commission's authority to use this auction method.⁴¹

62. We also seek comment on the experimental use of sealed second-bid auctions when offering licenses in groups and bidding is not expected to be intense. When few bidders are

³⁹ Bidders would not be permitted to make second round bids that are less than their winning bids in the first round.

⁴⁰ In particular, we seek comment on at what point, if any, we should be concerned that aggregation could result in undue market power leading to anticompetitive conduct.

⁴¹ Section 309(j) requires the Commission to prescribe area designation and bandwidth assignments that promote an equitable distribution of licenses and services among geographic areas and prohibits the Commission from making its public interest determination regarding these area designations based on revenue. The House Report explains that this provision is intended to insulate the Commission's communications policy decisions from "budgetary pressures." We do not believe that the proposal described above, which is designed to ensure that spectrum is used for its highest valued use, conflicts with Section 309(j)(7). Moreover, we note that nothing in the Budget Act is intended to be construed to prevent the Commission from issuing nationwide licenses, *see* Section 309(j)(6)(G), or from considering consumer demand as part of its determinations, *see* Section 309(j)(7)(C).

expected, bids may be less than the maximum amount parties are willing to pay and both oral auctions and sealed first-bid auctions may create a free rider problem for parties bidding on individual licenses. That is, even though all the tentative winners of individual licenses might benefit if licenses were issued individually, without cooperative action each might refrain from raising his bid in the hope that others would raise their bids enough that the licenses would be issued individually at no additional expense to himself. The free rider problem could be avoided if the Commission used an auction method that induced bidders to reveal the maximum amount they would be willing to pay for individual licenses. The sealed second-bid auction discussed above appears to be the most likely to do this, although it may have other defects. Under this approach a group of licenses would be issued only if the bid for the group of licenses exceeded the sum of the maximum amount bidders were willing to pay for individual licenses. Furthermore, if bidders truthfully bid their maximum willingness to pay, this efficient result would hold whether bids for individual licenses and a group of licenses were tendered sequentially or simultaneously. Finally, we also request comment on the use of combinatorial bidding in simultaneous ascending bid auctions.

63. **Limitations Placed by Bidders on Winnings or Expenditures.** If we allow sealed bids to be submitted simultaneously for a number of individual licenses or groups of licenses, bidders may win more licenses than they want. This could be a problem if we required firms to submit a deposit with each bid and were to keep the deposit of the high bidder even if that party declined to accept the license. One way to avoid this outcome would be to allow bidders to specify spending or other limits (e.g., total population in license areas) if they win more than one license. Permitting firms to specify expenditure or other limits in simultaneous sealed bid auctions would reduce their risk, possibly increasing the number of bids and total auction revenue.

64. Allowing bidders to submit a limitation on total expenditures would be easy to administer and would reduce a bidder's fear that winnings may exceed its financial resources. Under this approach, bidders could submit expenditure limits with their bids, and bids would be opened in a sequence announced before the auction. Any winning bid that would cause a bidder to exceed his expenditure limit would be disregarded and the next highest bid considered. Firms not wishing to set any limitation on total expenditures would not be required to do so.

65. We tentatively conclude that permitting bidders to specify such spending limits would not be necessary under oral bidding, electronic bidding, or sequential sealed bidding for individual licenses because these methods permit bidders to limit their expenditures directly. Furthermore, such spending limits would not be needed even under simultaneous sealed bidding if the Commission permits bids for individual licenses to be withdrawn without penalty. Therefore we propose that the Commission experiment with permitting bidder specified expenditure limits if and only if it uses simultaneous sealed bid auctions in which a winning bidder would forfeit a significant payment if the bid is withdrawn.⁴¹ We seek comment on these tentative conclusions.

66. **Minimum Bid Requirements.** Setting a "reservation" price below which the license will not be awarded could increase the government's expected return by inducing some

⁴¹ In section E below, we propose to allow sealed bids to be withdrawn without penalty up to the time bids are opened. If this proposal is adopted we see no reason to provide for expenditure limits.

buyers to raise their bids.⁴² For example, revenue would be increased in an oral auction if the reservation price were set above the second highest bid but below the maximum amount the winning bidder is willing to pay.

67. The benefits of setting a reservation price are likely to be greatest when there are very few bidders. When competition is intense the benefits of setting a reservation price may not be worth the cost. Setting a refusal price would require estimating the value of the license, which may be difficult and time consuming. Developing and implementing a procedure to use this estimate in calculating the minimum bid could further delay the initial auction date. Moreover, if no bids exceeded the minimum bid, the Commission would need to wait some interval before it could put the license up for bids a second time. Meanwhile, the public would lose the benefits of the services that could be provided with the spectrum. We tentatively conclude that there should be no minimum bid because the public interest benefits of facilitating the rapid provision of new services are clear, while the possible increase in auction revenues is uncertain. However, we seek comment on the possibility of establishing a minimum bid in auctions where the spectrum to be auctioned has an established value in the marketplace.

B. Alternative Payment Methods

68. Section 309(j)(4) requires the Commission to consider alternative payment methods including initial lump sum payments, installment payments and royalties. The administratively simplest option is to require full payment in a lump sum upon issuance of a license. This would leave financing to the private sector and eliminate the need for the Commission to conduct detailed checks of financial qualifications and creditworthiness. We propose to require full payment in a lump sum for all bidders other than the entities designated in the Act as deserving special consideration by the Commission to ensure their economic opportunity.⁴³

69. Allowing installment payments is equivalent to the government extending credit to the winner. This would reduce the amount of private financing needed by a prospective licensee, but it burdens the government with the risk of default. For this reason, we propose to limit this option to the entities designated by the Act as groups whose economic opportunity should be ensured and are likely to have difficulty obtaining adequate private financing. We seek comment on alternative installment payment options, including options for payment of interest.

70. A third payment method is a combination of an initial payment and royalties. This system is used by the Department of the Interior for outer continental shelf oil and gas leases. Firms bid on the amount of the initial payment and pay royalties at a fixed rate set by the government. If the FCC is licensing a highly risky service and the government (taxpayers) is better able to bear risk than the firm (shareholders) there may be an advantage to have some part of the payment in the form of a royalty. This benefit must be weighed against several difficulties. First, if the royalties are based on the output or revenues of the winning firm they will act as a tax and tend to reduce output. Second, royalties on FCC licenses may be very costly to administer. Unlike oil and gas royalties there is no easily identifiable output associated with the license. To collect royalties on FCC licenses the agency must establish accounting rules for identifying the share of revenues or profits attributable to such licenses. This is likely to prove extremely intrusive and difficult to implement in practice, especially when a license is used by

⁴² See Riley and Samuelson at 385.

⁴³ The lump sum payment would be for the balance of the winning bid remaining after payment of the deposit described in section E below.

a firm as part of a highly integrated communications service. Finally, the Commission may have difficulty determining an appropriate royalty rate. We seek comment on these tentative conclusions regarding royalties. We are also interested in comments on ways to improve the effectiveness of royalty payments as a possible solution to the entry cost problems of small bidders.⁴²

71. In addition, we request comment on the use of alternative payment methods for the entities designated in the Act for preferential treatment, the kind of method(s) that should be offered, which other applicants should be eligible for alternative payment plans, the interest rate, if any, that should be charged, and what standards the Commission or an outside contractor might use to evaluate an applicant's creditworthiness. Finally, we request comment on how the Commission should treat licensees who default on payments owed the government. For example, should licenses be conditioned on timely payments so that a default would result in immediate license cancellation? Should there be any grace periods or an opportunity for restructuring the payment plan? If the Commission should allow a grace period or restructuring of the payment plan, we intend to follow our procedures (including the payment of interest) under the Commission's existing debt collection rules and procedures. See 47 C.F.R. § 1.1901, *et seq.* We also request specific comment on the SBAC's distress sale proposal. The proposal would encourage transfers to designated entities where winning bidders are unable to pay.⁴³ We request comment on the most efficient administrative mechanisms for implementing these payment options.

C. Treatment of Designated Entities.

72. The new subsection 4(D) of Section 309(j) directs the Commission to ensure that small businesses, rural telcos, and businesses owned by women and minorities are "given the opportunity to participate" in the provision of spectrum-based services. Congress's objective was apparently to promote economic opportunity for the entities enumerated in the statute.⁴⁴

73. Before addressing specific proposals, it is appropriate to address at the outset the legal issues raised by these proposals. To implement this provision, we are considering a variety of measures including tax certificates, set-asides (i.e., certain designated spectrum blocks to be awarded in auctions open only to applicants that fall under one of the definitions for the eligible entities), bidding preferences, preferential payment terms such as delayed or extended installment payments to qualifying bidders, or other procedures. We note that any benign race or gender-conscious measures mandated by Congress - even those not "remedial" in the sense of being designed to compensate victims of past governmental or societal discrimination - are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to the achievement of those objectives. Meiro Broadcasting, Inc. v. FCC, 497 U.S. 547, 560-563 (1990), *see also* Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Fullilove v. Klutznick, 448 U.S. 448 (1980); Lamprecht v. FCC, 958 F.2d 382 (D.C. Cir. 1992). In addition, recent case law suggests that any race or gender-conscious preferential measures taken by the government must be supported by a convincing and comprehensive record that demonstrates that the government's methods are substantially related to the goal it hopes to achieve. Meiro Broadcasting, Inc. v. FCC, 497 U.S. at 560-563.

⁴² SBAC Report at 15

⁴³ SBAC Report at 16

⁴⁴ See Conf. Report at 482-484, *see also* H.R. Rep. No. 103-111 at 255

Lamprecht v. FCC, 958 F.2d at 399-408.⁴⁰ Therefore, because of the special constitutional concerns associated with preferential measures aimed towards minorities and women, it would appear that such race-or gender-conscious measures adopted in this proceeding would have to be supported by a record which demonstrates that such preferences are substantially related to the objectives of the Budget Act.⁴¹ With this in mind, we request specific comment on how we might satisfy concerns expressed in the relevant case law while fulfilling the statutory provisions relating to businesses owned by members of minority groups and women. Measures adopted for the other enumerated entities, rural telcos and small businesses, could be reviewed under a more deferential judicial standard. FCC v. Beach Communications, Inc., 61 U.S.L.W. 45323 (U.S. June 1, 1993).

74. Because case law in this area has a bearing on our legal authority, commenters should address whether we could satisfy the congressional objective simply by affording preferences to small businesses and other small entities, and through this means promote

⁴⁰ The House Report states that "unlike mass media licenses, where diversity of ownership contributes to diversity of viewpoints, most of the licenses issued pursuant to Section 309(j) will be services where the race or gender of the licensee will not affect the delivery of the service to the public." H.R. Rep. No. 103-111 at 255. We note, for example, that PCS licensees will probably not engage in services that involve the exercise of editorial control. PCS licenses, however, could be used to transmit electronic publications to multiple viewers. We seek comment on whether any of the services subject to competitive bidding possess the characteristics that warrant consideration of diversity factors as a matter of the public interest.

⁴¹ The Act's legislative history concerning the subject provision, Section 309(j)(4)(D), provides little guidance regarding the relationship between the preferential measures and the goal Congress hopes to achieve. See Conf. Report at 484. The text of the provision also does not appear to provide a specific finding in support of race- and gender-conscious measures. We note, however, that a similar provision, Section 309(j)(4)(C)(ii), refers to the Commission's obligation to ensure "economic opportunity for a wide variety of applicants, including ... businesses owned by members of minority groups and women." The legislative history of this provision, like the text, indicates that Congress' principal objective was to ensure economic opportunity for such groups. See Conf. Rep. at 484; H. Rep. No. 103-111 at 255. See also Section 309(j)(3)(B)(statutory objective to promote economic opportunity and new and innovative technologies). In this regard, moreover, the Supreme Court has noted that

[l]imiting our analysis to the immediate legislative history ... 'would erect an artificial barrier to [a] full understanding of the legislative process.' Fullilove v. Klutznick, 448 U.S. at 502 (Powell, J., concurring). The 'special attribute [of Congress] as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue. One appropriate source is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation. After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area.'

Metro Broadcasting, Inc. v. FCC 497 U.S. 547, 568 (1990) (quoting Fullilove v. Klutznick, 448 U.S. at 502-503, and also citing, at 478 (opinion of Burger, C.J.) ("Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings"). With this in mind, commenters may wish to address other relevant legislative actions concerning, for example, ownership diversity in the communications industry or discriminatory financial lending practices generally.

economic opportunity by ensuring that women and minorities are afforded an opportunity to participate. Alternatively, if commenters believe we should go further and provide preferences specifically tied to an applicant's minority or gender status, regardless of economic circumstances, these commenters should discuss how the standard of judicial review for such preferences can be satisfied. For example, commenters may wish to address whether evidence of discrimination against these groups within the context of radio licensing or financial lending practices is required, and if so, what type. If such evidence is required, commenters should point to the source of that evidence, for example, in the record of congressional proceedings or elsewhere. Alternatively, commenters should provide evidence of the degree to which these groups are underrepresented in the ownership of non-broadcast licenses. In this regard, commenters should address the findings contained in the SBAC Report, discussed below, para. 80.

75. While the statute lists all of the enumerated groups together, it does not indicate that each group must be afforded the same type of treatment. Thus, we tentatively concur with the SBAC Report that different approaches may be appropriate to address the specific concerns applicable to each enumerated entity. For example, the Commission could propose deferred payment terms for small businesses and tax certificates for businesses owned by women and minorities.⁴⁰ Notably, as discussed above, preferences afforded to businesses owned by women and members of minority groups could apply regardless of whether such businesses are small businesses. In addition, measures such as set-asides may be better suited for some specific services than others.⁴¹

76. We request comment on the types of mechanisms the Commission might employ to promote the objectives of Section 309(j)(4)(D). As indicated above, we are particularly interested in comments that discuss ways in which the Commission might craft a scheme of preferences that would both fulfill the objectives of the statute and comport with the relevant case law precedent.

Eligibility Criteria

77. In order to administer such measures, we would have to establish criteria for the enumerated entities. In the case of small business, we seek comment on whether we should rely on the definition devised by the Small Business Administration.⁴² For businesses owned by

⁴⁰ There is nothing that would appear to prevent a small business that was engaged in the provision of cable television service from being considered a small business within the meaning of the statute.

⁴¹ See, e.g., the Cellular Radio Service and IVDS, 47 C.F.R. Parts 22 and 95, respectively, where only two licensees serve a particular market.

⁴² See SBAC Report at 20-21. According to the Report, the SBA administers a variable standard for determining whether an entity is small for SBIC financial assistance purposes. The standard permits an applicant to qualify based on a net worth not in excess of \$6.0 million with average net income after Federal income taxes for the two preceding years not in excess of \$2.0 million. Alternatively, an applicant can qualify by showing that together with affiliates, and excluding affiliates, it meets the size standard for the industry in which it is primarily engaged as set forth in 13 C.F.R. § 121.601. See also 13 C.F.R. § 121.802(a)(2). The SBAC Report, however, also questions whether the existing net worth/income size standard is too low for telecommunications industries, such as PCS, that may be capital intensive.

women and minorities" and rural telcos,⁵² we propose to rely on existing Commission rules and policies. Thus, for purposes of this proceeding, we propose that rural telephone companies be defined as those carriers that are eligible for the exemption from the telephone company-cable television cross-ownership restrictions under Section 63.58 of our Rules.⁵³ We also seek comment about the scope of any specific treatment that might be afforded rural telephone companies. For example, should rural telcos be afforded preferential measures only where the license covers a market area or reliable service area that also encompasses all or some significant portion of their franchised service area? Or should there be no geographic restriction on the rural telephone company preference so that any rural telephone company can obtain a preference in any market licensed by the Commission? Should the fact that some rural telephone companies receive favorable financing from the Rural Electrification Administration have any bearing on the preferences rural telephone companies might receive? Regarding businesses owned by women and minorities, we seek comment on whether to qualify for preferential measures, women and minority backed applicants should be 50.1% owned by these groups or whether simple control is enough to qualify regardless of the percentage of the equity held.⁵⁴ In this regard, commenters should address how the Commission can deter potential abuses where less than 50.1% ownership and control is involved.

78. We also specifically request comment on how the Commission could ensure that any policies we might adopt to aid those groups that Congress was particularly concerned about did in fact aid those groups and not others who might merely use a member of one of those groups for the purpose of achieving special treatment by the Commission. In addition, we ask how we should apply such eligibility criteria to consortia, that is, whether such consortia must be wholly or predominantly comprised of the eligible entities in order to qualify for a preferential measure.

Specific Proposals

79. Because we are required to prescribe regulations to implement Section 309(j) within 210 days of the enactment of the Budget Act, we include the following specific proposals

⁵² The Commission has defined term "minority" to include "those of Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian and Asiatic American extraction." See Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979, 980, n. 8 (1978). Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 F.C.C. 2d 849, 489, n. 1 (1982), citing 47 U.S.C. § 309(i)(3)(C) (1982 ed.). In the past, the Commission has included women among its groups eligible for certain preferential measures. Gainesville Media, Inc., 70 F.C.C.2d 143, 149 (Rev. 2d. 1978). But see Lamprecht v. FCC, supra See also 47 C.F.R. § 1.1621(b).

⁵³ See, e.g., 47 C.F.R. § 63.58 (concerning rural telcos).

⁵⁴ The Commission has pending a request to modify the definition of rural telephone companies to those serving markets of 10,000 or less. The Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO) also has indicated a preference for this definition in the context of PCS. See Ex Parte presentation of OPASTCO in the PCS Proceedings, GEN Docket 90-314 (September 15, 1993), supra, note 1.

⁵⁵ See 47 C.F.R. §§ 1.1621(c), 1.1622.

applicable to the designated entities.³⁶ First, we propose installment payments with interest for all of the designated entities in order to ensure their economic opportunity.³⁷ We request specific comment, however, on whether the installment payment benefit should apply to all of the enumerated entities (including eligible consortia with designated entities) in all services, or only certain entities in certain contexts. Further, we seek comment on how we might further Congress's intent by utilizing tax certificates to ensure economic opportunity for the designated entities. Tax certificates might, for example, be used in addition to the installment payment with interest benefit for certain entities or services.³⁸ For a more detailed discussion of installment plans, tax certificates and other preferential measures, commenters should refer to the SBAC Report.

80. The SBAC Report addresses special barriers to telecommunications ownership encountered by women and members of minority groups, and we seek comment on its conclusions. Specifically, the SBAC Report recommends that we satisfy spectrum efficiency and economic opportunity objectives, and avoid undue concentration of ownership by affording licensing opportunities to small (i.e., independently owned, non-dominant) bidders.³⁹ In addition, it recommends measures to include such businesses through financial certification procedures,⁴⁰ bidding credits,⁴¹ installment payments and royalties,⁴² distress sales,⁴³ and tax certificates.⁴⁴ The

³⁶ See discussion of the applicability of 309(j)(4)(D) to PCS in Part IV, *infra*.

³⁷ We propose to assess interest at the prime rate (as announced periodically in the Wall Street Journal) plus one percent under the installment plan for such designated entities. The rate could be fixed at the time the installment payment plan begins or could vary with the prime rate. Cf. 47 C.F.R. § 1.1940.

³⁸ At this time, we foresee two examples of tax certificates that could apply to a system of competitive bidding. In the first example, an entity not eligible for preferential measures under the statute ("entity X") "wins" an auction and is granted a license, and then transfers the license to a "designated entity." Entity X would be eligible for a tax certificate. The second example involves an investor in a designated entity that "wins" an auction and is granted a license. The investor would be eligible for a tax certificate upon divestiture of its interest. Commenters should address these specific examples or other possible uses of tax certificates in the context of Section 309(j)(4)(D), such as those recommended in the SBAC Report, discussed below.

³⁹ SBAC Report at 1-6, 8.

⁴⁰ The SBAC Report recommends that applications from enumerated entities should be allowed to "self-certify" financial qualifications. That is, such applicants could include an investment banker's letter, combined with the applicant's internal funds and bank commitments. In addition, it recommends that SBA chartered Small Business Investment Companies (SBICs) and Specialized Small Business Investment Companies (SSBICs), should be treated as bona fide financial institutions for reasonable assurance purposes. SBAC Report at 12-19.

⁴¹ The SBAC recommended that the Commission protect the public interest in the use of the spectrum by authorizing alternative methods of bidding, bid calculation, and bid payments for bidders with superior service proposals. In particular, alternative bidding calculations would allow technical and non-technical innovators to discount, or amortize, the bid the applicant would otherwise pay based on a qualitative assessment of the applicant's business development proposal. To qualify for the credit, the SBAC Report states that the bidder would have to

SBAC Report, however, does not suggest the same treatment for each group-targeted for the economic opportunity provisions. In support of its recommendations, the SBAC Report cites its finding that "entry opportunities for small service providers have been constrained in existing telecommunications markets by undercapitalization, concentration of ownership, and other conditions contributing to the exclusion of businesses owned by minorities and women." The SBAC Report also found that "[c]apital formation is one of the major barriers to full participation by small and minority businesses."⁶⁵ We request comment concerning these measures discussed in the SBAC Report insofar as they relate to spectrum auctions.

81. In a related matter, we seek comment on how we can draft rules to achieve the objectives and requirements of Section 309(j)(3)(B) and (4)(C). These provisions also reflect a Congressional concern for the entities discussed above and direct us to, *inter alia*, promote competition by avoiding concentration of licenses and to promote an equitable distribution of licenses among geographic areas. For the purpose of avoiding undue concentration, commenters should address whether the Commission needs to adopt specific rules limiting eligibility for licenses, other than those already in existing service rules. Commenters should include in their comments discussion of whether we should take into account the other radio licenses already held by bidders.

D. Safeguards

82. This subsection addresses three types of safeguards for the auction process. Two of them—measures to prevent "unjust enrichment" and performance requirements—are expressly addressed by the statute. The third—rules prohibiting collusion among bidders—is one that we explore on our own motion.

83. Preventing unjust enrichment. The Budget Act directs the Commission to "require such transfer disclosures and antitrafficking restrictions and payment schedules as may be

qualify as (a) a member of a designated entity, or (b) a consortium owned and controlled by firms owned by members of the designated entities. We seek comment on the extent to which members of the preferred groups can be deemed to be "technical innovators," and the extent to which it is feasible to reach such determinations prior to conducting individual auctions.

⁶⁵ Id.

⁶⁶ The SBAC Report recommends use of distress sale procedures where winners are ineligible, unqualified, or unable to pay.

⁶⁷ The SBAC Report recommends three ways that the Commission could issue tax certificates. The first SBAC recommendation would encourage relocating microwave incumbents that elect tax certificate treatment to satisfy reinvestment requirements by furnishing capital to designated entities. The second SBAC recommendation involves the Commission issuing tax certificates for investments in and by SSBICs in order to facilitate greater reliance on SSBIC financing for start-up and operational finance of licensees. The SBAC's third recommendation would enable owners and investors of minority owned and controlled service facilities subject to competitive bidding to obtain tax certificates upon sale of their stock interests, provided that the entities remain minority owned and controlled. See generally *Kansas State Network, Inc. v. FCC*, 720 F.2d 185 (D.C. Cir. 1983).

⁶⁸ Id. at i (Executive Summary).

necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits." Sec 47 U.S.C. 309(j)(4)(E). The House Report suggests that, while the Commission should keep track of all transfers of licenses issued via auctions, unjust enrichment is likely to be a problem only in auctions where participation is limited in order to ensure designated entities' opportunity to participate.⁴⁴ In an unlimited bidding process, the winner is likely to pay the market price for its license. Hence resale would not involve any unjust enrichment.

84. These considerations lead us to propose that when requests for transfers of designated entity licenses are submitted to the Commission pursuant to Section 310(b), specific provisions be implemented to prevent unjust enrichment for licenses obtained in auctions where members of designated entities have participated pursuant to some specific provision designed to ensure their participation in the provision of spectrum-based services.⁴⁵ The Budget Act mentions antitrafficking restrictions and payment schedules as measures available to prevent unjust enrichment. However, an outright prohibition on transfer, even for a limited time such as one year, may block or delay efficient market transactions needed to attract capital, reduce costs, or otherwise put in place owners capable of bringing service to the public expeditiously. In other words, a prohibition on resale could have the unintended effect of delaying service to the public, contrary to the goals of the Budget Act.⁴⁶ For this reason, while we seek comment on transfer prohibitions, we request comment on a system of financial disincentives to prevent sellers from realizing any windfall profit from premature sale of a license. This procedure appears to be invited by the language of the House Report, which notes, in its commentary on section 309(j)(4), that "[T]his paragraph expressly authorizes the Commission to impose or assess payments in order

⁴⁴ The House Report notes that "[I]n a system of open competitive bidding, trafficking in licenses should be minimal, since the winning bidder would have paid a market price for the license. Nevertheless, the Committee anticipates that the Commission will monitor trafficking in licenses issued pursuant to the provisions of section 309(j), and will impose any necessary regulations and transfer fees as may be necessary to prevent unjust enrichment. In the event that the Commission limits participation in any given competitive bidding procedure, however, there exists a significant possibility that licenses will be issued for bids that fall short of the true market value of the license. To the extent that the Commission is attempting to achieve a justifiable social policy goal—such as the reservation of appropriate licenses for small business applicants—licensees should not be permitted to frustrate that goal by selling their license in the aftermarket. In these instances, antitrafficking restrictions are necessary and appropriate." H. R. Rep. No. 103-111 at 257.

⁴⁵ We seek comment on what information transferees of licenses should be required to furnish to the Commission and, in particular, whether transferees must submit special or additional information when a premature transfer is requested. We also seek comment on the time interval during which transfers should be considered "premature" and thus subject to any special or additional information requirements that we may adopt. Finally, we recognize that there may be situations where such transfers, even if considered "premature" in some contexts, should not be considered "unjust enrichment." If, for example, the Commission issued a tax certificate to permit an investor in a licensee controlled or composed of one or more of the designated entities to sell his or her interest and not recognize the gain on the sale of that interest, we might not consider this gain to be unjust enrichment: the tax certificate would serve as an incentive to invest in the economic opportunity enterprise in the first instance, and any attempt to recapture this profit would work at cross purposes with the purpose of the tax certificate policy, which is to encourage such investment.

⁴⁶ Sec 47 U.S.C. §§ 309(j)(3)(A) and (4)(C)

to prevent unjust enrichment resulting from trafficking in licenses."

85. We seek comment on this general approach and on the particular form of payment that we should impose on early transfers of licenses granted under preferences and on the interval of time after initial grant during which transfer payments would be imposed. With respect to the amount of the payment, if the preference took the form of deferred payments, perhaps we should provide that all future payments become due to the government when the license is prematurely transferred to a licensee not eligible for the preference. If the preference were a set-aside, the payment could be based on the estimated difference between the price paid at the auction and the price that would have been paid without the set-aside. If both preferences were used, then both types of payments would apply.

86. Implementing this scheme of payments would require estimation of the price that would have been paid in the absence of a set-aside. Where there are clearly comparable licenses awarded by an open auction, this should not be difficult to do. We seek comment on the likelihood that such "comparable" prices will be available. In the event that comparables are not available, we seek comment on how to calculate the payment. One approach would be to permit the seller to recover only the price it paid for the license plus any out-of-pocket expenses it incurred in building facilities or otherwise preparing to provide service. The seller would be required to remit to the government any proceeds received from the transfer in excess of this amount. This would preserve licensee incentives to make the necessary investments in providing service.

87. We also seek comment on whether any interest charges should be included in the payment calculations. For example, if a comparable price is available, the difference between the comparable price and the set-aside price could be viewed as a loan from the government to the preferred licensee. A payment equal to the difference between the comparable and set-aside prices would then constitute recovery of the principal, but it may also be appropriate to collect interest on this "loan." If a comparable price is not readily available, and the amount of proceeds that the set-aside licensee may retain is calculated based on its outlays, in order to preserve investment incentives, it may be appropriate to allow the set-aside licensee to earn some return on its investment outlay. Commenters favoring the use of interest charges of one kind or another should address the issue of the magnitude of these charges. See also para. 79, supra.

88. All of these proposals leave open the possibility of disagreement regarding the magnitude of the payment to be imposed for premature transfer of a set-aside license. This is a consequence of attempting to preserve licensee investment incentives prior to any transfer. We seek comment on the following alternative, which has the advantage of being unambiguous but may attenuate investment incentives. Licenses granted pursuant to a set-aside could have a condition attached to them to the effect that, in the event of a premature transfer, the initial licensee would pay the amount equal to a certain percentage of the difference between the initial bid price and the transfer price. Commenters favoring this option are requested to propose an appropriate percentage for calculating the payment. We note that even the transfer price may be difficult to determine for deals that are not pure cash transactions. We seek comment on how to calculate a "cash-equivalent" price for calculation of payments. We also seek comment on the simpler procedure of calculating the payment as a fixed percentage of the purchase price and on what the appropriate percentage would be, if we were to adopt this procedure. Finally, we propose as an alternative conditioning designated entities' licenses on there being no premature

transfer of those licenses. A forbidden transfer would cause the license to cancel automatically.⁷⁰ While drastic, this remedy is self-enforcing and simple to administer.

89. The Budget Act also amends Section 309(i) of the Communications Act to require the Commission, within 180 days of the date of enactment, to "prescribe such transfer disclosures and antitrafficking restrictions and payment schedules as are necessary to prevent the unjust enrichment of recipients of licenses or permits as a result of the methods employed to issue licenses under this subsection" (i.e., lotteries).⁷¹ The language of this provision mirrors that of Section 309(j)(4)(E), the subsection requiring the Commission to prevent unjust enrichment from resale of licenses obtained via auctions. The legislative history of that section indicates that the Commission may "impose or assess payments in order to prevent unjust enrichment resulting from trafficking in licenses."⁷² We tentatively conclude that we may assess payments to prevent unjust enrichment in the case of lotteries as well. We seek comment on this tentative conclusion and generally on how to implement the new Section 309(i)(1)(C). What antitrafficking restrictions, if any, are appropriate in addition to the payments that we might impose? What should the time period be for any such restrictions, e.g., three years or less? How should the payments be calculated?

90. Performance Requirements. The Act requires the Commission to "include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services."⁷³ The House Report provides a specific example of the warehousing concern, suggesting that "an incumbent service provider could submit a bid for a license in a service that would compete with an existing business, and engage in behavior that would prevent competition from occurring. This would deny the public both the benefit of having access to the new service, and the benefits of competition."⁷⁴

91. As long as transfer of licenses is permitted, valuable spectrum licenses are unlikely to be warehoused, that is, held out of use even though it would be profitable for a firm without market power to provide service using that spectrum. The cost of warehousing is the value of the foregone uses that could be made of the license, either by the licensee itself or by others who could purchase the license from the initial licensee. When the license is purchased by auction, the out-of-pocket expenditure by the licensee makes the cost of not exploiting the license more obvious and explicit, which may be particularly effective in deterring warehousing.

92. We therefore seek comment on the extent to which warehousing might take place and the circumstances, if any, in which it is particularly likely to occur. Additionally, although the

⁷⁰ *P and K Remmer v. FCC*, 743 F.2d 918 (D.C. Cir. 1984).

⁷¹ See Section 309(i)(1)(C) of the Communications Act, as amended. This provision was adopted from the House bill without change. The legislative history suggests that Congress intended to limit "the ability of lottery winners to sell their license, so as to prevent the churning and profiteering that has characterized lotteries." H.R. Rep. No. 103-111 at 259.

⁷² H.R. Rep. No. 103-111 at 257.

⁷³ 47 U.S.C. § 309(j)(4)(B).

⁷⁴ H.R. Rep. No. 103-111 at 256.

statute requires performance requirements, we seek comment on whether we must impose performance requirements for all licenses awarded by auction. Are there circumstances in which the likelihood of warehousing is sufficiently low that requirements are not needed? Are suitable alternatives available, such as restricting ownership of licenses to non-incumbents?" We note that for many existing services, Commission rules already include performance requirements (e.g., regulations that specify the time interval within which facilities must be constructed). We seek comment on whether these performance requirements by themselves would be sufficient, whether additional ones are required, or whether any existing performance requirements may be relaxed for licenses to be auctioned." See also paras. 102-109, *infra*, which address deposit and other requirements.

93. Prohibition of collusion. Although not required by statute, we seek comment on whether the Commission should adopt rules specifically prohibiting collusive conduct. For example, the Commission could prohibit all potential bidders from collaborating, sharing information, or otherwise discussing with one another any information regarding the substance of bids or bidding strategies prior to the completion of the auction. Such rules would serve the objectives of the Act by preventing parties, especially the largest firms, from agreeing in advance to bidding strategies that divide the market according to their particular interests and disadvantage other bidders. Moreover, anticollusion rules might strengthen confidence in oral bidding mechanisms⁷³ and would help ensure that the government receives a fair market price for the use of the spectrum.⁷⁴ On the other hand, if anticollusion rules are too tightly drawn, they could prevent the formation of efficiency enhancing bidding consortia that pool capital and expertise of small firms in order to compete against bigger firms, especially for wide area or nationwide licenses. We request comment on how such bidding consortia should be treated. Further, we seek comment on how to deter collusive efforts that could undermine participation by small business entities in a variety of markets, either as part of consortia or as independent entities.

94. We also seek comment on enforcement mechanisms and penalties for violation of anticollusion rules. Does the Commission have adequate resources to investigate and adjudicate collusion allegations? Should the penalty be a forfeiture, license denial, license revocation, prohibition on participation in future auctions, or something else? To what extent is conduct of this nature already prohibited by criminal law provisions outlawing bid rigging,⁷⁵ or by the antitrust laws? If current law is adequate to address collusion, should the Commission disqualify

⁷³ In this context, an incumbent is an entity already licensed to provide a service equivalent to the service that could be provided using the license to be auctioned. Commenters favoring this option should specify which classes of licensee might, for purposes of competitive bidding, be regarded as "incumbents" and what criteria should be used to identify these classes of licensee. Commenters should also address the appropriateness of this approach in the absence of specific limits in existing rules governing multiple ownership or other existing ownership restrictions.

⁷⁴ For new services, we would have the opportunity to propose any necessary performance requirements when we propose other rules for those services.

⁷⁵ See para 38, *supra*, for a discussion of collusion concerns in oral auctions.

⁷⁶ In this regard, we seek comment on whether post-application, pre-auction settlement agreements should be banned. See para. 160, *infra*.

See e.g. *U.S. v. Guthrie*, 814 F.Supp. 942 (E.D. Wash. 1993).

from auction participation anyone convicted of an antitrust or similar criminal violation in connection with an FCC auction?

E. Application, Bidding, and Licensing Requirements

95. This subsection seeks comment on what requirements, in addition to existing service-specific qualifications for all applicants, we should impose on prospective bidders and on auction winners with respect to their eligibility and qualifications to hold a license, on how to structure the expedited procedures for "resolution of any substantial and material issues of fact concerning qualifications,"⁹⁰ and on procedures to follow in the event that the tentative winner is ineligible, unqualified, or unable to pay the amount bid.

96. Application processing requirements. The statute requires that no party may participate in an auction "unless such bidder submits such information and assurances as the Commission may require to demonstrate that such bidder's application is acceptable for filing." Moreover, "[N]o license shall be granted to an applicant selected pursuant to this subsection unless the Commission determines that the applicant is qualified pursuant to subsection (a) and sections 308(b) and 310."⁹¹ The House Report comments separately on these two requirements. With respect to the first, it notes that the Commission may require "that bidder's applications contain all information and documentation sufficient to document that the application is not in violation of Commission rules," and states that "applications not meeting those requirements may be dismissed prior to the competitive bidding."⁹² With respect to the second requirement, the House Report makes it clear that the statute gives the Commission "the discretion to make this determination only with respect to the winning bid, and does not require the Commission to make this determination for all applicants prior to the competitive bidding procedure."⁹³

97. Therefore, in order to reduce the administrative burdens of the initial stages of the auction process, avoid unnecessary delay in the availability of service, and encourage applicants to participate in the process, we propose that, in response to a Commission Public Notice of a filing window or cut-off date in services that are subject to auctions, all applicants interested in participating must file a short-form application (modeled on the Commission's "Transmittal Sheet for Cellular Applications"). We propose that applicants also submit a long-form application at the same time (which, for existing services, will be the application form currently in use)⁹⁴, and

⁹⁰ 47 U.S.C. § 309(j)(5).

⁹¹ Id.

⁹² H.R. Rep. No. 103-111 at 258.

⁹³ Id.

⁹⁴ In the case of an application for an SMR or IVDS license, for example, the second part of the application would be FCC Form 574. In the case of a cellular applicant, the second part would be FCC Form 401. No additional fee would have to be paid upon submission of the second part of the application. We propose that PCS applicants seeking a license would file on FCC Form 574 if they wished to provide service that is not classified as Commercial Mobile Service under our Section 332 Rule Making and on FCC Form 401 if they seek to provide Commercial Mobile Service. If they seek to provide both types of service, they should file both forms.

an application fee," but we tentatively conclude that, prior to the auction, we will review only the short-form applications to determine acceptability for filing. However, we also seek comment on the possibility of reviewing both the long and short form applications prior to the auction, or on requiring submission of the long-form application subsequent to the auction.

98. We seek comment on the information that we should require to be included on the short-form application, but we tentatively conclude that at least the following shall be required: the license for which the applicant wishes to bid, the applicant's name,⁶⁶ the identity of the person who will be making the bid (in the case of an oral auction),⁶⁷ certification that the applicant is qualified pursuant to Sections 309(a), 308(b), and 310 of the Communications Act and any other service-specific qualification rules that the Commission might adopt or has already adopted for the particular service,⁶⁸ and certification that the applicant satisfies any financial qualifications requirements that the Commission has adopted or might adopt for the service in question.⁶⁹ If the applicant wishes to take advantage of any special provisions for the designated entities, the short-form application must contain a statement to that effect and certification that the applicant is, in fact, a member of the group claimed.

99. An application without certification of compliance with Commission rules would be dismissed. We seek comment on procedures for applicants seeking waivers of the rules. Commenters should address in particular the relative advantages and disadvantages of ruling on such waiver requests prior to the auction, rather than after the auction was completed. Denial of any waiver request would preclude participation in an auction. We also request comment on whether we should require different information from different services and expressly ask for comment on information to be filed by PCS applicants.

⁶⁶ This fee would be the applicable Section 8 fee for the service in question. See 47 U.S.C. § 158(g). As discussed below in Section IV, we propose Section 8 fees for PCS services.

⁶⁷ If the applicant is a corporation, then the short form application should include the name and address of the corporate office and the name and title of a responsible officer or director. If the applicant is a partnership, then the application should include the name, citizenship and address of all partners, and if a partner is not a natural person, then the name and title of a responsible person should be included as well. If the applicant is a trust, then the name and address of the trustee should be included.

⁶⁸ In sealed bid auctions, we would need the identity of the person qualified to with draw the bid prior to the opening of any bids. See para. 169, *infra*.

⁶⁹ See, e.g., the restriction in Section 90.603(c) of our Rules barring wire line telephone common carriers from eligibility in the SMR service and the restrictions in Section 22.901 of our Rules governing the participation of the regional Bell holding companies in the cellular radio service.

⁷⁰ We also seek comment, however, on the SBAC's proposal to allow certification of financial qualifications to build and construct based on "highly confident" letters from qualified investment banking firms, venture capital funds, and SBA chartered Specialized Small Business Investment Companies (SSBICs). See, e.g., Advanced Mobile Phone Service, Inc., 91 FCC 2d 512, 517 (1982). We also ask that commenters address the SBAC's proposal to treat SSBICs as financial institutions for purposes of certifying financial qualifications. SBAC Report at 12, 13.

100. We tentatively conclude that the short-form application should be judged by a letter-perfect standard. In light of the minimal information required, use of a letter perfect standard should not unduly burden or affect applicants. Applications that do not contain all requested information or that otherwise violate the requirements in the rules would be dismissed with no opportunity for resubmission.⁹⁰ As we gain more experience with the auction process, we might entertain a more liberal standard in order to encourage qualified bidders. At present, however, considerations of time and simplicity appear to require a letter-perfect standard of some sort, although we solicit comment on this matter. With regard to the long-form application, we propose to rely to the extent possible on existing service rules. With that in mind, we seek comment on appropriate standards for evaluating long-form applications. In addressing evaluation standards, commenters should make clear their assumptions about when the long-form application is to be filed and reviewed (i.e., before or after the auction).

101. After we have received applications and conducted an initial review, we propose to issue a Public Notice prior to the auction listing the qualified bidders and would also notify all applicants of whether their applications were acceptable for filing.⁹¹ We seek comment on the appropriate interval of time between this notification and the actual auction, but think it should be at least 45 days. In order to meet our statutory deadline to commence issuing PCS licenses and permits, we may adopt an expedited schedule for our initial PCS auctions. We seek comment on the minimum necessary notice of an upcoming auction. If an auction is to be held, we seek comment on whether we should permit amendments or modifications to the application after it has been submitted. We tentatively conclude that, in order to reduce administrative burdens, no modifications of any kind should be permitted to be filed until after the auction. We seek comment, however, on whether to permit minor, but not major ownership modifications prior to the auction. We also seek comment on the appropriate time period in which we should allow submission of any such amendments and on what would constitute a minor modification in these circumstances, especially if only a short-form application is filed prior to auction. To enforce the purposes of our cut-off rules, we tentatively conclude that major modifications to applications, especially major changes in ownership, should not be permitted.⁹²

102. Deposit and other requirements for entering bids. In order to realize the Act's goals of ensuring prompt delivery of service to rural areas and promoting rapid deployment of new

⁹⁰ We propose to apply existing rules governing submission of fees. See 47 C.F.R. § 1.1101 *et seq.* These rules provide for dismissal of an application if the application fee is not paid, is insufficient, is in improper form, is returned for insufficient funds or is otherwise not in compliance with our rules. We seek comment on extending these procedures to new services.

⁹¹ Should only one application be acceptable for filing, we shall issue a Public Notice to that effect and, if required, implement the relevant procedures permitting petitions to deny. See paras. 110-112, *infra*. We would, however, not hold an auction inasmuch as there would be no mutually exclusive applications.

⁹² We specifically request comment, however, on how to process the application of an auction winner who is in violation of our ownership restrictions only by virtue of the fact that an affiliated entity has won another auction held after the first auction's filing deadline. Should we permit such auction winners to modify their applications to come into compliance with our ownership rules?

technology.⁶⁰ It is important to limit bidding to serious qualified bidders, and to minimize the probability that, after the auction is over (and the participants have dispersed), the Commission finds that it cannot award a license to the auction winner.⁶¹ To ensure that only serious, qualified bidders participate in our auctions, we propose to require that each participant in an oral or sealed bid auction tender in advance to the Commission a substantial sum (an "upfront payment"), by cashier's check⁶² or, perhaps in the future, by electronic funds transfer as a condition of entry to the portion of the auction premises reserved exclusively for bidders.⁶³ We also seek comment on a proposal that, if a party bids simultaneously on a group of licenses and individual licenses in the group, the upfront payment would be the greater of the sum of the individual upfront payments or the upfront payment for the group. The upfront payment and any additional deposit (see related discussion, *infra*) would operate as a financial qualification in those services for which no other demonstration of financial qualification is required.⁶⁴ In those services where financial qualifications are required, it would operate as an additional financial qualification requirement.

103. We propose to calculate the magnitude of the upfront payment based on the amount of spectrum and population, i.e., "pops", covered by the license, and announce it in a Public Notice issued prior to the auction. We seek comment on parameters for this calculation that would yield upfront payments large enough to accomplish the Act's goals as described in the previous paragraph. For example, if we used a figure of 2 cents per megahertz per pop,⁶⁵ each bidder for a 20 megahertz license for a market with a population of 20 million would need to tender an upfront payment of \$8 million in order to be able to bid. For narrowband channels in sparsely populated areas (e.g., public coast stations in the Pacific Northwest region), our proposed formula could yield a very small upfront payment. Even in a market with a population of one million, for some narrowband channels, the payment could be as low as \$200. We seek comment on whether such low payments are sufficient to ensure participation by only serious, qualified bidders. Commenters who judge these payments insufficient are requested to comment on alternative formulas. For example, would it be useful to impose a minimum upfront payment of

⁶⁰ See paras. 12-13, *supra*. See also para 18, *supra*, where we tentatively conclude that the Act's purposes would be served by an administratively simple auction procedure.

⁶¹ The auction winner is the party with the highest bid that also tenders to the Commission the requisite deposit within the specified time period.

⁶² We further propose that the cashier's checks be drawn in U.S. dollars on a United States bank with assets in excess of one billion dollars and be payable to the Federal Communications Commission. This requirement would make it easier to assure the validity of the cashier's check if the need to do so arose.

⁶³ We seek comment on the alternative procedure of only requiring auction participants to exhibit the upfront payment as a condition of entry to the portion of the auction premises reserved exclusively for bidders.

⁶⁴ In many services, we require licensees to demonstrate that they have sufficient funds to build and operate the facilities to be licensed for a period of time.

⁶⁵ The Congressional Budget Office estimates the auction value of a 25 megahertz PCS license to be approximately \$15 per pop or about 60 cents per pop per megahertz. Congressional Budget Office, AUCTIONING RADIO SPECTRUM LICENSES 15 (March 1992). Our proposed up-front payment of 2 cents per pop per megahertz for such a license would thus equal only about 3 percent of the winning bid.

\$1,000, \$5,000, or some other specific figure?"

104. While the requirement to tender (or perhaps only to exhibit) a substantial upfront payment should exclude frivolous or manifestly unqualified bidders from participating in auctions, we are also eager to minimize the probability that, after we examine an auction winner's application and call for the balance of its bid, we find that we cannot award a license to the auction winner. To minimize this probability, we tentatively conclude that, before a bidder is declared the auction winner and the auction is terminated, that bidder must tender a significant and non-refundable sum to the Commission.¹⁰⁰ We therefore propose that the high bidder tender its upfront payment to the Commission immediately, if that payment has not already been tendered to the Commission. However, we question whether the prospect of losing an upfront payment of the magnitude described above provides sufficient incentive to applicants to ensure that they meet all qualifications and financial requirements for grant of the license. We therefore propose that, if the upfront payment were less than 20 percent of the high bid,¹⁰¹ the bidder would also have to pay the difference promptly.¹⁰²

105. We seek comment on when the 20 percent deposit should be due to the Commission. One option is to require immediate payment by the high bidder. Once the deposit payment is made, the high bidder is declared the auction winner, thus completing the auction, after which the participants disperse. This option makes it possible to continue the auction if the high bidder cannot tender the necessary deposit. It is our preferred option in the case of sealed bids, where bidders would know in advance the exact amount needed to make a 20 percent deposit. However, because collecting an additional payment of uncertain size, as would be necessary under this procedure in an oral auction, may be difficult to accomplish immediately, we seek comment on the method of payment for this amount (cashier's check, or perhaps in the future, electronic funds transfer, etc.) and on whether it is practical to keep an oral auction open while the high bidder provides that additional payment.

106. We also seek comment on the advantages and disadvantages of providing additional time, say one or two business days, for oral auction bidders to tender to the Commission the balance of the 20 percent deposit. This option has the advantage of reducing the administrative burden on winners, and it could still be sufficient to prevent the delay in service to the public that

¹⁰⁰ We also seek comment on whether upfront payments for licenses in higher frequency ranges, e.g., above 10 GHz, should be reduced to reflect the generally lower per MHz value of spectrum in such ranges.

¹⁰¹ We propose to return the upfront payments of bidders that are not auction winners as soon as we have verified receipt of the full deposit of the auction winner. Because the Commission does not maintain interest bearing accounts with the U.S. Treasury, we would be unable to pay interest on any monies received, and therefore, we can not now pay interest on such deposits. We seek comment on whether we should take the necessary steps to open interest bearing accounts.

¹⁰² A 20 percent downpayment is required for bids on offshore oil and gas leases. New Zealand required a 25 percent deposit be submitted with bids for spectrum licenses.

¹⁰³ The upfront payment and any additional deposit payments are part of the applicant's bid. They are separate from any additional financial qualification requirements for licensing (i.e., requirements to show that the applicant has sufficient additional funds to build and operate the facilities to be licensed).

would result if we processed the winner's application, with attendant petition to deny pleading cycles, only to find that the winner does not have the requisite funds. However, if the high bidder fails to provide the balance of its deposit within the next few days after the auction, it would be necessary to conduct another auction, or alternatively, to offer the award to the second highest bidder. We request comment on this option.

107. Another option on which we seek comment is to treat the upfront payment alone as the deposit. Were we to do so, it might be advisable to alter the formula to yield larger upfront payments. This option has the advantage of administrative simplicity, but in cases where the Commission significantly underestimates the value of the license in question and therefore specifies an upfront payment that is very low relative to that value, the upfront payment may be too small to provide the necessary incentives to applicants that are outlined in paras. 102 and 104. We seek comment on which of these procedures (or some other alternative) would effectively preclude frivolous or fraudulent bidding while not unduly burdening serious, qualified applicants.

108. In the case of sealed bid auctions, we propose to permit bidders to withdraw prior to the opening of any bids. This procedure would also allow bidders to take into account the licenses previously won and accepted and thus facilitate efficient aggregations.¹⁰³ As described below (see paras. 167-171), an interval of 60 days or more may elapse between the application submission deadline and the auction. Market and technological conditions may change within that time period. If participants in sealed bid auctions are required to submit their bids along with their applications, then they could be at disadvantage, particularly in cases of combinatorial bidding. Therefore, we propose that sealed bids be submitted five days prior to the auction. We seek comment on whether this is an appropriate interval.

109. We also specifically seek comment on the Commission's authority to retain the upfront payment or deposit in the event that an auction winner subsequently is found ineligible or unqualified or is unable to pay the balance of its bid at the appropriate time. Section 309(j) requires the Commission's auction procedures to promote "efficient and intensive use of the electromagnetic spectrum" and directs the Commission to "promote investment in and rapid deployment of new technologies and services." Moreover, we have concluded above at para. 18 that Section 309(j)'s purposes would be furthered by an administratively simple auction process. In order to accomplish these goals, we tentatively conclude that some strong incentives must be in place to deter frivolous bids or unqualified bidders that could leave the Commission without an auction winner that is qualified and eligible to receive a license. We note that the new law specifically directs the Commission to "include performance requirements, such as appropriate deadlines and penalties for performance failures ... to promote investment in and rapid deployment of new technologies and services."¹⁰⁴ We also seek comment on alternative approaches, such as barring such applicants from future auctions, in the event that we do not have authority to keep deposits. Additionally, we seek comment on other methods the Commission might use to ensure that only serious and otherwise qualified bidders participate in any type of auction we might hold.

110. Resolution of substantial and material issues of fact concerning qualifications. The

¹⁰³ See paras. 63-65.

¹⁰⁴ 47 U.S.C. § 309(j)(4)(B). See also H. R. Rep. No. 103-111 at 257 (Commission authorized to impose payments to prevent unjust enrichment from trafficking. House Committee on the Budget anticipates Commission will use this authority to deter participation in licensing process by those who have no intention of offering service to the public).

statute directs the Commission to adopt expedited procedures consistent with the provisions of section 309(i)(2) to resolve substantial and material issues of fact concerning qualifications.¹⁰⁰ This provision requires us to entertain petitions to deny the application of the auction winner if petitions to deny are otherwise provided for under the Communications Act or our Rules. We also seek comment on whether we must adopt petition to deny procedures for services in which we propose to auction licenses but which do not now have petition to deny procedures.¹⁰¹ Should we decide to permit petitions to deny for such services, we would utilize existing procedures where appropriate. If petitions to deny are required for any new services, we shall adopt specific procedures on a service-by-service basis.

111. We seek comment on two possible schedules for entertaining petitions to deny in cases where such petitions are required. In order to expedite the auction process and attenuate incentives for auction losers to "gang up" on the winner, we could put all applications on Public Notice upon receipt, even though we might have reviewed only the short-form applications (see para. 97, *supra*), and allow 30 days for petitions to deny. This procedure would elicit all petitions prior to the auction (see para. above). We seek comment on whether we would be required to accept at a later date supplements to petitions to deny from petitioners claiming to have acquired new information. How would a requirement to accept such supplements affect the advisability of this particular petition to deny schedule? An alternative petition to deny schedule would place only the auction winner's application on Public Notice for 30 days following the auction. Interested parties could then file petitions and the auction winner will reply. We seek comment on this tentative procedure and on when the application should be placed on public notice.

112. We also seek comment on what procedures consistent with section 309(i)(2) we should adopt in the event that the Commission identifies substantial and material issues of fact in need of resolution.¹⁰² We tentatively conclude that the Commission need not conduct a hearing before denial if it determines that an applicant is not qualified and no substantial issue of fact exists concerning that determination. We also note that, notwithstanding any other provision of law, section 309(i)(2) permits in any hearing the submission of all or part of evidence in written form and allows employees other than administrative law judges to conduct hearings. Commenters should thus address both the use of written proceedings and the participation of employees other than administrative law judges (or the Commission itself) in these proceedings.

113. Procedures when tentative winner is ineligible, unqualified, or unable to pay. As explained at para. 102, *supra*, we have concluded that, to prevent undue delay in the auction process, measures and procedures must be in place to reduce the risk that auction winners are later found to be unqualified, ineligible, or unable to pay the balance of their bid. We have proposed that the Commission would retain the auction winner's deposit (20 percent of its winning bid)¹⁰³

¹⁰⁰ 47 U.S.C. § 309(i)(5) forbids the granting of licenses as a result of competitive bidding unless the Commission determines that the applicant is qualified.

¹⁰¹ The application procedures for certain private radio applications do not contemplate the filing of petitions to deny. See 47 U.S.C. §§ 309(b) and (d)(1).

¹⁰² Among the procedural models on which we seek comment are those for mutually exclusive cellular applications in the top 30 markets (see 47 C.F.R. § 22.916(b)) and those for certain lotteries (see 47 C.F.R. § 1.822(b)).

¹⁰³ If we only require an upfront payment (and do not require a 20 percent deposit), then in these circumstances the Commission would retain the upfront payment.

in the event that the winner is found to be unqualified, ineligible, or unable to pay the balance of its bid. We believe that the prospect of losing such a significant deposit will provide a strong incentive to bidders to ensure that they have adequate financing and that they meet all eligibility and qualification requirements. If an auction winner is later disqualified for any of the reasons mentioned in this paragraph (an event that we expect to happen rarely), we propose that the Commission would hold a new auction. We seek comment on this analysis and suggested procedure. We expressly seek comment on whether, or in what circumstances, such auctions should be open to new bidders, as well as those who participated previously.

IV. Specific Services

114. We focus now on those classes of licenses and permits that should be included within or excluded from competitive bidding. We propose, for this purpose, to divide the licenses and permits issued by the Commission into two broad groups. The first group, such as PCS licenses, consists of classes of licenses or permits for which it is imperative to decide quickly whether and how those licenses should be subjected to competitive bidding. The second group consists of licenses and permits for which a decision on competitive bidding, while important, is not required as quickly for the first class.

A. Personal Communications Services (PCS)

115. The Budget Act requires us to conclude the various dockets collectively known and commonly referred to as the PCS proceedings¹⁰⁹ within 180 days after enactment of that Act. We are further required to commence licensing within 270 days after enactment of the Budget Act. It is, therefore, imperative to resolve quickly the question of whether and how PCS would be the subject of competitive bidding.

116. In the Narrowband PCS Order, ET Docket No. 92-100 and GEN Docket No. 90-314, FCC 93-329 (released July 23, 1993) we defined PCS broadly as composed of a "wide array of mobile, portable and ancillary communications services to individuals and businesses," Order at paras. 13-14. Judging from the nature of the comments and the identity of the commenters that we have received to date in the PCS proceedings, we anticipate that many PCS licensees will operate in the manner contemplated by new Section 309(j)(2)(A). Specifically, we expect the principal use of PCS spectrum, considered as a class, is reasonably likely to involve the licensee receiving compensation from subscribers in return for enabling those subscribers to transmit or receive communications on frequencies on which the PCS licensee is authorized to operate.¹¹⁰ We request comment on our tentative conclusion.

117. Turning next to whether the criteria of Section 309(j)(3) would be satisfied by competitive bidding for PCS licenses (assuming that the criteria in Section 309(j)(2)(A) are satisfied), we address each of the criteria individually. First, we believe that the use of competitive bidding will speed the development and rapid deployment of PCS service to the public, including those residing in rural areas, with minimal administrative or judicial delays as required by Section 309(j)(3)(A). For some time now, our experience with the comparative

¹⁰⁹ See n. 1, *supra*.

¹¹⁰ We anticipate that this would be the case with both "wideband" and "narrowband" PCS services. We have provided that some PCS services would be unlicensed, and do not propose to apply competitive bidding to that class of PCS service.

hearing process has been less than satisfactory in terms of both administrative and judicial delay.¹¹¹ We anticipate that competitive bidding will ensure that PCS licenses end up more quickly in the hands of those who will provide service to the public without the delays attendant to the comparative hearings: competitive bidding should avoid some of the vigorous and time consuming litigation over admittedly fine points of fact and law that can make the difference in a comparative hearing.¹¹²

118. With respect to promoting the objectives of Section 309(j)(3)(C), competitive bidding will recover for the public a portion of the value of the spectrum made available for commercial use. We believe that competitive bidding is much more likely to recover a greater proportion of the value of the spectrum for the public than existing methods of awarding licenses.¹¹³ Currently, the only direct monetary compensation the public receives for use of the spectrum is, with few exceptions, the application fees paid by most Commission applicants. Further, as made clear by the Conference Report, the new fees established by Congress in Section 9 are intended to recover the costs of the Commission's activities with respect to those licensees. Thus, any relationship that these fees may bear to the intrinsic value of the license would likely be coincidental. We also discuss above our general proposals, applicable to PCS, which are designed to avoid unjust enrichment as well as our proposals concerning PCS bidders that are eligible for preferential measures.¹¹⁴

119. Finally, in accordance with subsection (j)(3)(D), we ask whether competitive bidding will promote efficient and intensive use of the spectrum. We believe that it will, both in general and in the particular case of PCS. Even without performance requirements, licensees have an incentive to use spectrum efficiently and intensively in the provision of a service if that spectrum can be put to some other valuable use by themselves or others. The broader the service definition and the fewer restrictions on the transfer of licenses, the greater the forgone earnings from using spectrum wastefully. Auctions are likely to reinforce the desire of licensees to make efficient and intensive use of the spectrum. Auctions make explicit what others are willing to pay to use the spectrum, and the licensees' need to recoup the out-of-pocket expenditure for a license may provide additional motivation to get the most value out of the spectrum.

120. We tentatively conclude that bidding for groups of licenses should be given a significant test in licensing broadband, but not narrowband, PCS (GEN Docket No. 93-314).

¹¹¹ See, e.g., Kwerel and Felker, "Using Auctions to Select FCC Licensees," OPP Working Paper Series No. 16, May 1985. In our experience, most comparative hearings for licenses in rural areas do not proceed appreciably faster than comparative hearings for licenses in most urban areas.

¹¹² See, e.g., Judge Leventhal's dissent in *Star Television v. FCC*, 416 F.2d 1086 (D.C. Cir. 1969), cert. denied 396 U.S. 888 (1969).

¹¹³ Kwerel and Felker, *supra*, at 16-20.

¹¹⁴ We do not believe that comparative hearings to issue PCS licenses are a realistic alternative given the statutory mandate for the rapid deployment of new technologies and services and specifically the short deadline within which Congress has required us to begin issuing PCS licenses. We believe that the use of lotteries is similarly precluded given the likelihood that PCS is likely to have subscribers and in light of Congress's direct intent that lotteries be employed only when the Commission determines what services are not for a use described in Section 309(j)(2)(A). We nevertheless request comment on these conclusions.

Specifically, we propose this combinatorial bidding for awarding the 51 MTA licenses on each of two 30 MHz spectrum blocks (blocks A and B).¹¹⁵ We would accept sealed bids for all 51 licenses on block A as a group. Then we would conduct oral auctions sequentially for individual MTA licenses on block A. The sealed bids would be opened only after the 51 oral auctions have been completed. If the winning nationwide (sealed) bid on block A is greater than the total of the winning regional (oral) bids for block A, all the licenses on block A would be awarded as a group. The same procedure would then be repeated for block B. We seek comment on this tentative proposal. We also seek comment on providing a second round of sealed bidding limited to the winners of the first round if combinatorial bidding is used. See infra at para. 60.

121. We sought comment above on our general proposals to disseminate licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by minorities and women ("designated entities") in order to promote the objectives of Section 309(j)(4)(D). In the specific case of broadband PCS, we propose to set aside two blocks of spectrum nationwide, one of 20 MHz (Block C) and one of 10 MHz (Block D), in the broadband PCS service, reserved for bidding purposes to the designated entities. See PCS Report and Order, GEN Docket 90-314, 8 FCC Rcd ____ (1993). In this manner, the designated entities for which the Commission is required to ensure economic opportunity would only bid against one another for this service, and thereby be safeguarded from having to bid against other entities that, under Section 309(j)(4)(D), do not need special measures. In addition, we propose to allow the designated entities to use installment payment plans with interest for bids within the set-aside blocks.¹¹⁶ Because this proposal provides access to capital to facilitate bids for specific, set-aside blocks of PCS broadband spectrum, we believe it would ensure economic opportunity for the designated entities identified in Section 309(j)(4)(D). We seek specific comment on this proposal concerning the designated entities for broadband PCS. We also seek comment on whether to afford this installment plan preference to the designated entities when they bid for non-set-aside blocks of broadband PCS spectrum, and whether tax certificates should be provided to the designated entities that bid either within or without the set-aside spectrum blocks. Finally, we ask whether consortia that include among its members certain designated entities should be eligible for preferential measures when they bid for spectrum generally. If such consortia are eligible, we propose to make available the same investment incentives (e.g., deferred payment plan with interest) as would be available to other eligible designated entities.

122. In the case of narrowband PCS, we believe that our general scheme of preferential measures, discussed above, is appropriate. That is, because we expect to auction thousands of narrowband PCS licenses, we do not propose a specific block of spectrum set-aside for bidding purposes. Rather, we propose to allow all designated entities to use installment payments with interest for payment of their bids. We believe that this proposal would help ensure the economic opportunity of such entities to promote the objectives of Section 309(j)(4)(D). In addition, we seek comment on whether, and if so, how, we should apply tax certificates to the designated entities that seek to bid for narrowband PCS. We request comment on this proposal for

¹¹⁵ Should we be concerned, and if so to what extent, that combinatorial bidding to provide national service would result in anticompetitive behavior?

¹¹⁶ We propose to assess interest at the prime rate (as announced periodically in the Wall Street Journal) plus one percent under the installment plan for such designated entities. The rate could be fixed at the time the installment payment plan begins or could vary with the prime rate. Cf. 47 C.F.R. § 1.1940. A license would be conditioned on timely payment of these sums. Default would cause the license to cancel automatically and the spectrum would be subject to re-auction.

narrowband PCS.

123. We also seek comment on whether combinatorial bidding should be used to facilitate grouping of broadband PCS licenses with BTA service areas. Specifically we request comment on whether the Commission should accept sealed bids for all BTA licenses within each MTA and conduct oral auctions sequentially for individual BTA licenses. If a winning bid for all the licenses within a MTA is greater than the total of winning BTA bids, all the BTA licenses within the MTA would be awarded as a group. Commenters should address whether combinatorial bidding should be permitted on the two blocks we propose to set aside for designated groups. Allowing combinatorial bidding might, on the one hand, enhance the ability of the designated groups to compete with other licensees, but on the other hand, it might exclude participation by the individual small business applicants.

124. We also seek comment on the use of this approach to aggregate 10 MHz broadband PCS licenses into 20 MHz or 30 MHz blocks. Finally, we request comment on using this technique to permit aggregation across both geographic areas and spectrum blocks. For example, the Commission could accept a group bid on all BTA licenses on two 10 MHz spectrum blocks within each MTA.

125. We also propose that within each spectrum block we would auction the biggest markets first in both narrowband and broadband PCS. Auction winners of licenses for large cities might well seek to cluster smaller markets around a large market "hub" in order to achieve economies of scale and scope. We note that the cellular industry has generally developed in this manner, indicating that this may be an economical and efficient business strategy. We also seek comment on the sequence of auctioning PCS licenses across spectrum blocks.

126. We also plan to utilize our earlier proposal of 2 cents per pop per MHz for the upfront payment in both narrowband and broadband PCS auctions. By our calculation, for example, the upfront payment for a 50 KHz nationwide unpaired narrowband PCS license # would be approximately \$260,000 (260 million pops multiplied by 1/20 of a MHz multiplied by 2 cents)."

127. We have incorporated certain performance requirements into our requirements for licensees in both the narrowband and wideband PCS services with which auction winners will be required to comply. See generally, PCS Reports and Orders. As noted above, auction winners will, of course, also have to comply with restrictions on incumbents already promulgated in those dockets.

128. We propose that all PCS applicants seeking a license would file on FCC Form 574 if they wished to provide service that would not be classified as Commercial Mobile Service under our Section 332 Rule Making and on FCC Form 401 if they seek to provide Commercial Mobile Service. If they seek to provide both types of service, they should file both forms and pay both fees¹¹. For Commercial Mobile Service providers, we propose that the standard for

¹¹ Pops would be determined based on 1990 Census data.

¹² We propose to exempt from competitive bidding entities forcibly relocated by our orders in ET Docket No. 92-9. First Report and Order, 7 FCC Rcd 6886 (1992). Second Report and Order, FCC 93-350, released August 13, 1993; Second Report and Order, FCC 93-351, released August 15, 1993, in order to safeguard the public interest. The only reason these entities would fall under the statute's criteria for "initial licenses" is because they have been

filing FCC Form 401 be similar to the one applied to cellular applications for new stations proposing to provide service to Rural Service Areas (RSAs). Under this standard, applicants would be required to demonstrate that they have the available financial resources to meet the realistic and prudent estimated costs of constructing and operating their facilities for one year. The application of the RSA standard has provided the Commission with sufficient information to afford a preliminary determination regarding the applicant's general qualifications without imposing a disproportionate administrative burden upon either the applicant or the Commission's processing staff.¹¹⁹ In order to avoid needless duplication, we propose that the following general filing and processing rules apply to all PCS: Sections 22.3-22.45 and 22.917(f), and 22.918-22.945, 47 C.F.R. §§ 22.3-22.45 22.917(f), and 22.918-22.945. For those PCS applicants who file on Form 574, we believe that sections 90.113-90.159 of our rules, 47 C.F.R. §§ 90.113-90.159, could be used to process those applications with appropriate modifications. We seek comment on what those modifications should be.

129. We will shortly develop a PCS short form application/transmittal sheet along with instructions on how and where to send the application along with the appropriate fee. We propose that for PCS applications, no modifications of any kind be permitted until after a winning bidder has emerged, and propose to charge a \$230 fee for commercial mobile service PCS applications and a \$35 fee for private mobile PCS applications.¹²⁰

130. Consistent with our general proposals discussed earlier, we would use competitive bidding where we receive two or more mutually exclusive PCS applications for the same frequency or frequency block in the same market (e.g., BTA, MTA). We further propose to utilize a one day filing window similar to the procedures used in other services such as the Cellular Radio service.¹²¹ The one day filing window has worked well in other services, has allowed the Commission to process large volumes of applications expeditiously and, at the same time, kept applicants' filing expenses to a minimum.

B. Private Radio Services.

Part 90 - Private Land Mobile Services.

131. The 220-222 MHz Land Mobile Systems (Subpart T of Part 90) The 220-222 MHz Land Mobile Systems licensed under Subpart T (hereafter 220 MHz) are a new service consisting of three categories of licensees: Commercial Nationwide providers, who we anticipate will provide service to subscribers for compensation, Noncommercial Nationwide providers, who we anticipate will provide service principally for internal use, and Local providers, who may do either. Although we might consider all 220 MHz licenses as a single class of service, we propose instead to subdivide them into several subservice categories, some of which would be eligible for competitive bidding.

forced to relocate. In fairness to such relocated licensees, we believe this proposed action is consistent with the requirement in Section 309(j)(3) that the Commission safeguard the public interest. We request comment on our tentative conclusion.

¹¹⁹ See 47 C.F.R. §§ 22.12 and 22.923.

¹²⁰ See 47 U.S.C. § 158(g).

¹²¹ See, e.g., First Report and Order and Memorandum Opinion and Order on Reconsideration, 6 FCC Red 6185 (1991).

132. The 220 MHz Local licensees may, at their discretion, provide communications service either for internal purposes or to subscribers for compensation without seeking advance permission from the Commission. Because most such licensees have not begun providing service, it is too early to determine whether it is reasonably likely that 220 MHz Local licenses will be used primarily for the provision of service to subscribers for compensation.¹²²

133. For future reference, however, we request specific comment on whether it is reasonably likely that initial mutually exclusive applications for 220 MHz Local licenses generally should be subject to competitive bidding under the criteria in Section 309(j).¹²³ If the principal use of all 220 MHz licenses or 220 MHz Local licenses as a class is for the provision of service to subscribers for compensation, we might find that all mutually exclusive 220 MHz or all mutually exclusive 220 MHz Local applications (with the exception of those frequencies reserved exclusively for public safety purposes)¹²⁴ should be subject to competitive bidding.

134. For 220 MHz Noncommercial Nationwide systems, our rules require that these systems be used for the internal business communications of the licensee although they are permitted to make excess capacity available.¹²⁵ Therefore, because it is not "reasonably likely" for purposes of section 309(j) that the principal use of such licenses will involve the receipt of compensation from subscribers for communications services rendered, it appears that the 220 MHz Noncommercial Nationwide systems should not be subject to competitive bidding.

135. On the other hand, mutually exclusive applications for the 220 MHz Commercial Nationwide band are reasonably likely to involve primarily a subscriber-based service.¹²⁶

¹²² Although lotteries for the issuance of 220 MHz Local licenses and, as discussed below, Commercial Nationwide licenses have already been held and licenses are being issued, it is possible that some licenses may not be awarded or will be canceled. In that event, we do not wish to incur substantial delays while we determine on the applicability of Section 309(j) to this class of service before accepting applications for and granting additional 220 MHz licenses. It is because of the uncertainty with respect to how 220 MHz Local licensees will actually conduct their businesses that we have not proposed to use competitive bidding immediately to award these licenses. By contrast, unserved area cellular applicants will utilize their licenses in the provision of service to subscribers for compensation.

¹²³ Both those who seek to provide services to subscribers for compensation as well as those who would use these channels purely for internal purposes are eligible to apply for 220 MHz licenses. See 47 C.F.R. § 90.703. Certain 220 MHz frequencies are reserved for public safety eligibles. These frequencies would not appear to be subject to competitive bidding in any event because they would not be principally used for the provision of service to subscribers for compensation and are specifically referenced in the legislative history, discussed above, as providers of "private services" that should not be subject to competitive bidding under the subject statute. See 47 C.F.R. § 90.720.

¹²⁴ Under this scenario, frequencies reserved for public safety purposes would be "private" for purposes of applying Section 309(j) and therefore would not be subject to competitive bidding. Id.

¹²⁵ 8 FCC Rcd at 4161-4162.

¹²⁶ See note (122), supra.

Therefore, in the event the Commission is unable to complete licensing in the 220 MHz Commercial Nationwide band from among those applicants who had filed prior to the July 26, 1993 deadline established by Congress, we propose to subject any future mutually exclusive applications for the 220 MHz Commercial Nationwide licenses to competitive bidding. We seek comment on whether subjecting the 220 MHz Commercial Nationwide band to competitive bidding would promote the objectives of 47 U.S.C. § 309(j)(3). Consistent with our discussion of IVDS below, however, we believe that "private service" applicants that are mutually exclusive with subscriber-based applicants for the 220 MHz Commercial Nationwide band should be subject to competitive bidding because these frequencies have been designated for use principally to provide for-profit service to subscribers.¹²⁷

136. 800 MHz and 900 MHz Specialized Mobile Radio Systems (SMRs) (Subpart S of Part 90). SMRs are radio systems in which licensees provide private land mobile communications services (other than radiolocation services) in the 800 MHz and 900 MHz bands for compensation to subscribers who are themselves eligible to be licensed under Part 90 of the Commission's Rules, Federal Government entities, and individuals.¹²⁸ They are currently classified under a separate subpart (Subpart S) of Part 90 of the Commission's Rules. Part 90, in turn, treats Private Land Mobile Radio Services (in the sense used by the Commission) generally. We believe that SMRs are different from most other licensees regulated under Part 90 because they are one of the few classes of licensees regulated by the Private Radio Bureau where it is explicitly contemplated and expected that licensees will provide service to subscribers for compensation.¹²⁹ We therefore analyze SMRs separately with respect to competitive bidding.

137. We believe it necessary to focus on the SMR industry now because it is an important industry that is currently undergoing significant change and development: the Commission has received many applications for wide area, high capacity SMR systems and is likely to receive more applications after the conclusion of certain ongoing Commission proceedings that could fundamentally alter the nature of the SMR regulatory climate.¹³⁰ Inasmuch as these decisions are imminent, it is imperative to the progress of the SMR industry that we determine quickly whether SMR licenses should be subject to competitive bidding.

138. Channels allotted for use by SMRs are intended to be used primarily for the purpose of offering service to subscribers.¹³¹ SMR licensees usually are authorized exclusive use of

¹²⁷ See Report and Order, Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services, 6 FCC Rcd 2356 (1991). See also discussion of Interactive Video and Data Service, *supra*.

¹²⁸ 47 C.F.R. § 90.15.

¹²⁹ See Subparts M and S, PR Docket No. 86-404, 3 FCC Rcd 1838 (1988), *recon. den.*, 4 FCC Rcd 356, 359 (1989).

¹³⁰ See, e.g., Notice of Proposed Rule Making, PR Docket No. 93-144, 8 FCC Rcd 3950 (1993), further Notice of Proposed Rule Making, PR Docket No. 89-553, 8 FCC Rcd 1469 (1993). We will incorporate into the dockets of these proceedings any comments that are germane to competitive bidding.

¹³¹ See Memorandum and Opinion, Docket No. 18262, *supra*.

channels, and thus SMR licensing in these bands may involve mutually exclusive applications.¹³² Inasmuch, as it is overwhelmingly likely that SMRs will provide service to subscribers for compensation, we propose to subject the 280 channel pairs at 800 MHz and the 200 channel pairs at 900 MHz available to SMRs under Part 90¹³³ of the Commission's Rules to competitive bidding.¹³⁴ We believe that applying a system of competitive bidding to SMRs would promote the objectives of Section 309(j)(3).¹³⁵

139. General Category Channels and Intercategory Sharing In addition to channels set aside for SMRs, a substantial number of frequencies at 800 MHz have been allocated to eligibles for their internal use. Of these channels, 150 channel pairs in the 800 MHz band may be licensed for internal "private service" use as well as for use by SMRs. These frequencies are commonly referred to as General Category channels. Similarly, both SMRs and entities that provide public safety and other "private services," within the meaning of Section 309(j), may, under some circumstances, access frequencies normally allocated to other classes of users through intercategory sharing.¹³⁶ Mutually exclusive applications from such entities could conceivably be accepted for filing because the subject spectrum is usable by both the providers of "private services" and SMRs.¹³⁷ The legislative history of Section 309(j) states that most "private services" should not be subject to competitive bidding. Therefore, we do not believe it was Congress's intent that General Category frequencies or frequencies subject to intercategory sharing be subject to competitive bidding.¹³⁸ Furthermore, because this spectrum is not allocated principally for subscriber-based services (unlike the 220 MHz Commercial Nationwide band), the result here is

¹³² We note that the current Commission practice of utilizing waiting lists for SMRs almost always avoids potential mutually exclusive conflicts between applications for SMRs. Because nothing in Section 309(j) requires us to discontinue practices that avoid mutual exclusivity, this Notice does not reach the issue of waiting lists for SMRs. See 47 U.S.C. § 309(j)(6)(E); see also H. R. Rep. No. 103-111 at 258-259. We note, however, that the Commission has proposed to eliminate waiting lists in a separate proceeding. See Notice of Proposed Rule Making, PR Docket 93-144, 8 FCC Rcd 3950, para. 34 (1993).

¹³³ 47 C.F.R. § 90.617(d).

¹³⁴ We note that in PR Docket Nos. 93-144 and 89-553, we proposed changes that will increase the potential for mutually exclusive applications. In addition, we propose new types of licenses operating on SMR frequencies that, under Section 309(j) appear to be subject to competitive bidding. We request commenters to address whether a system of competitive bidding should be used to license wide-area SMRs in the 800 MHz and 900 MHz bands, and if so, how particular auction rules should be applied to those services.

¹³⁵ See para. 12. See also, e.g., discussion of PCS, *supra*. We tentatively conclude that this analysis is applicable to the wide-area SMR systems proposed in PR Docket Nos. 93-144 and 89-553. We request specific comment on this conclusion that will be incorporated into the dockets of those proceedings.

¹³⁶ See, e.g., 47 C.F.R. §§ 90.179 and 90.603 (eligibility of non-SMR Part 90 eligibles for licensing in the 806-824/851-869 MHz and 896-901/935-940 MHz bands); 47 C.F.R. § 90.621(g) (intercategory sharing of frequencies in the 806-821/851-866 MHz bands).

¹³⁷ In our experience, however, this has been a rare occurrence.

¹³⁸ H. R. Rep. No. 103-111 at 254.

distinguishable from the approach taken with some other services. In addition, we seek specific comment on whether competitive bidding should apply to mutually exclusive "finder's preference" applications.¹³⁹

140. We also believe that requiring competitive bidding for all 800 MHz frequencies that could conceivably be used by SMRs through intercategory sharing or for all General Category channels would disserve the public interest. Such a result could see police departments, for example, having to bid against SMRs for access to 800 MHz frequencies. We do not believe that Congress contemplated this result. See H.R. Rep. No. 103-111 at 254. In addition, Section 309(j) requires the Commission to include safeguards to protect the public interest when identifying classes of licensees that are to be subject to competitive bidding.¹⁴⁰ Therefore, where licensees who use their spectrum for private purposes and SMRs are both authorized to operate in certain segments of the 800 MHz band (either by applying for General Category frequencies or through intercategory sharing), we think that Section 309(j) contemplates the exclusion of those frequencies from competitive bidding in order to safeguard the public interest. Accordingly, we propose that, where mutually exclusive applications are accepted for filing from an SMR and a provider of private services, within the meaning of Section 309(j), lotteries, rather than competitive bidding, would apply.

141. As discussed above, Section 309(j)(4)(D) directs the Commission to ensure that certain designated entities are ensured the opportunity to participate in the provision of spectrum under a system of competitive bidding. In the context of 800 MHz and 900 MHz SMRs, we propose to apply the general scheme of preferences discussed above for services other than broadband PCS. We request that commenters specifically address such proposals in the specific context of SMRs. In addition, commenters should also specifically address our proposed auction methodologies in the context of SMRs.¹⁴¹

¹³⁹ See 47 C.F.R. § 90.611(d). Under those rules, members of the public may submit to the Commission information that results in the takeback of SMR channels. Should those channels be taken back, the finder receives a dispositive preference with respect to those channels. We tentatively conclude that since a successful finder's preference is dispositive, there is no mutual exclusivity between the finder and the existing licensee and thus competitive bidding is inapplicable. We request comment, however, on the use of competitive bidding to resolve two or more finder's preference requests for the same channel or channels. We believe that our analysis for General Category frequencies and intercategory sharing would also apply to finder's preference applicants that operate in such spectrum (e.g., if a public safety entity is one of two or more finder's preference requests for the same channel or channels, then under the above analysis the conflict (assuming *arguendo* that such a conflict would constitute mutual exclusivity) would be resolved by lottery rather than auction).

¹⁴⁰ 47 U.S.C. § 309(j)(3).

¹⁴¹ Because we tentatively conclude that our analysis for SMRs would apply to the wide-area SMRs proposed in PR Docket Nos. 93-144 and 89-553, commenters should also specifically address preferential measures and auction methodologies for the proposed systems that would be incorporated into the dockets of such proceedings.

Part 95 - Personal Radio Services.

142. Interactive Video and Data Service (IVDS) (Subpart F of Part 95). IVDS is a new radio service that provides the capability for two-way interaction with commercial and educational television programming as well as with informational and data services that may be delivered by broadcast television, cable television, wireless cable, direct broadcast satellite, or any future television or data delivery methods. The IVDS licensee is, therefore, a private short distance communications service provider for subscribers located at fixed locations in a service area.¹⁴²

143. Under the IVDS rules, only two IVDS licensees may serve a particular service area or market.¹⁴³ The use of the IVDS spectrum may involve mutually exclusive applications because an IVDS licensee is assigned the exclusive right to use one specific frequency segment in a particular market.¹⁴⁴ Because IVDS was expressly established as a subscriber-based commercial service,¹⁴⁵ the principal use of IVDS-allocated spectrum is reasonably likely to involve the licensee receiving compensation from subscribers for communications services.¹⁴⁶ Therefore, as a subscriber-based commercial service, IVDS is not a "private" service within the meaning of Section 309(j). While governmental and educational entities are eligible under the IVDS rules and policies,¹⁴⁷ their participation as licensees does not affect the substantive pecuniary character of the service.¹⁴⁸ When Congress enacted the exception that permits lotteries for applications accepted for filing prior to July 26, 1993, the legislative history stated that this provision was

¹⁴² 47 C.F.R. § 95.803(a)

¹⁴³ 47 C.F.R. § 95.803(b).

¹⁴⁴ In response to the opening of three filing windows for nine service areas, we received approximately 4,100 IVDS applications for licenses.

¹⁴⁵ See 47 C.F.R. §§ 95.803(a) and 95.805(d). See also Report and Order, GEN Docket 91-2, 7 FCC Rcd 1630 (1992).

¹⁴⁶ See, e.g., 47 C.F.R. § 95.805(d) (noting that "[t]he licensee may use the IVDS system to interact with its subscribers concerning products and services offered, polls conducted, educational classes taught, and other activities in conjunction with video and data delivery systems.") (Emphasis added).

¹⁴⁷ See Second Memorandum Opinion and Order, PR Docket 91-2, 8 FCC Rcd 2787 (1993) (clarifying that governmental and educational entities are eligible for IVDS licenses)

¹⁴⁸ The eligibility of governmental and educational entities for IVDS is analogous to the ability of such entities to invest in other commercial ventures, such as real estate or the stock market. The participation of such entities in a commercial venture does not transform the substantive character of the commercial venture. With this in mind, we note that Congress rejected a provision in the Senate Bill that would have exempted state and local governmental entities from competitive bidding generally. See Conf. Rep. at 481. Therefore, we do not believe that Congress intended to exempt any IVDS licensees from competitive bidding on the basis of such status.

enacted in order to allow the first nine IVDS markets to go to lottery.¹⁴⁹ Congress thus clearly envisioned that, absent the exception for grandfathered IVDS applicants, competitive bidding would apply to IVDS. Consistent with this evidence of Congressional intent, we also believe that applying a system of competitive bidding to IVDS would promote the objectives described in 47 U.S.C. § 309(j)(3). Accordingly, we propose to subject IVDS to competitive bidding.^{150 151}

144. In addition, in order to ensure that certain designated entities are ensured the opportunity to participate in the provision of IVDS spectrum under a system of competitive bidding, we propose to apply the general scheme of preferences discussed above for services other than broadband PCS. Commenters should specifically address such proposals discussed above in the specific context of IVDS. Further, commenters should also specifically address our proposed auction methodologies in the context of IVDS.

Other Private Radio Services or Subservice Categories.

145. Although not as pressing as with SMRs and IVDS, we seek service-specific comments concerning whether mutually exclusive applications seeking to provide service to subscribers for compensation in the following private radio services or subservice classifications should be subject to competitive bidding under Section 309(j). Comments that narrowly focus on this issue may serve as a record for future Commission actions concerning the application of competitive bidding to such services. These private radio services would include the following:

¹⁴⁹ See Conference Report at 498 (stating that the exception that allows the Commission to proceed with a system of random selection for applications accepted for filing prior to July 26, 1993, was enacted to "permit the Commission to conduct lotteries for the nine [IVDS] markets for which applications have already been accepted").

¹⁵⁰ This proposal does not apply to the first nine IVDS markets. Applications for the first nine IVDS markets were accepted for filing prior to July 26, 1993, and the Commission conducted a lottery for those markets on September 15, 1993.

¹⁵¹ In light of the above analysis, we propose that because it is "reasonably likely" that IVDS would involve licensees providing communications services to subscribers for Section 309(j)(A) purposes, IVDS would be subject to competitive bidding even if some individual licensees, at their option, choose not to receive compensation from their own subscribers.

(1) Private Carrier Paging,¹³² (2) Automatic Vehicle Monitoring¹³³ (3) Public Coast and Alaska-Public Fixed Stations, (4) Aeronautical En Route and Fixed Stations, (5) Private Land Mobile Radio Service (PLMRS) entities operating at 470-512 MHz,¹³⁴ and (6) the following Private Operational-Fixed Microwave Services: (a) the Multiple Address Service, (b) Digital Termination Systems, (c) 18 GHz Video Entertainment Channels, and (d) the Digital Message service. We request comment on whether other private radio services or categories of services should be subject to competitive bidding.

146. In addition, we propose to exclude all other private radio services from competitive bidding because they do not meet the criteria established by Section 309(j). Because aircraft and ship radio stations, for example, operate on shared spectrum, there can be no mutual exclusivity. Similarly, private land mobile stations below 800 MHz operate on shared spectrum as well.¹³⁵ Therefore, we propose to also exclude such private land mobile spectrum as well as aircraft and ship stations from competitive bidding. The classes of services that would be excluded from competitive bidding under our proposal because, inter alia, they do not appear to be primarily providers of communications services to subscribers appears to include: (1) Microwave Stations

¹³² As a subscriber-based service, PCP appears to meet the statutory criteria for competitive bidding. At present, however, PCP frequencies are assigned on a non-exclusive basis, and therefore do not give rise to mutually exclusive applications. We nevertheless seek comment on whether competitive bidding could be required in the future if we end non-exclusive assignment of PCP frequencies. In a pending proceeding, we have proposed to allow exclusive frequency assignments for qualified systems on 35 of the 40 private paging frequencies at 929-930 MHz. See Notice of Proposed Rule Making, PR Docket No. 93-35, 8 FCC Rcd 2227 (1993). With this in mind, we tentatively conclude that if mutually exclusive applications occur, we would use competitive bidding to select a licensee. We seek comment on what procedures would best facilitate the licensing process.

¹³³ We will delay action on the applicability of competitive bidding to this service because certain fundamental questions about the nature of this service are now being considered in a separate proceeding. See Notice of Proposed Rule Making, Amendment of Part 90 of the Commission's Rules to Adopt Regulations for the Automatic Vehicle Monitoring Systems, PR Docket No. 93-61, 8 FCC Rcd 2502 (1993). A decision on some of these issues (e.g., whether exclusive AVM channels will be prescribed) could moot the issue of whether these channels should be subject to competitive bidding. In addition, it appears that because AVM frequencies are shared with the government, which is primary in this band, the principal use of these frequencies might not be for the provision of service to subscribers for compensation, as contemplated by Section 309(j). We request comment on our tentative conclusion.

¹³⁴ Mutually exclusive applications by entities offering service to subscribers for compensation could occur because assignments in this band can be exclusive. Because the primary use of these frequencies at 470-512 MHz is by licensees who must share them, we do not believe that this band would be primarily used for the provision of service to subscribers. Cf. Notice of Proposed Rule Making, PR Docket No. 92-235, 7 FCC Rcd 8105 ("Refarming") (1992). We request comment on our tentative conclusion.

¹³⁵ As noted above, however, a limited number of private land mobile radio licensees at 470-512 MHz have achieved channel exclusivity by loading sufficient mobiles on their channels.

in the POFS not referenced above,¹⁵⁶ (2) Alaska-Private Fixed Stations, (3) the Citizens Band Service, (4) the Radio Control Service, (5) the General Mobile Radio Service, (6) the Amateur Radio Service, (7) the following Marine Stations: (a) Marine Support Stations, (b) Marine Operational Fixed Stations, (c) Marine Stations in the Radiodetermination Service, (8) Non-SMR licensees above 800 MHz,¹⁵⁷ (9) Multiple Licensed Systems below 800 MHz, (10) PLMRS under 470 MHz,¹⁵⁸ and (11) the following aviation stations: (a) Flight Test Stations, (b) Aviation Support Stations, (c) Aeronautical Utility Mobile Stations, (d) Aeronautical Search and Rescue Stations, (e) Emergency Aviation Communications, (f) Airport Control Tower Stations, (g) Aviation and Marine Operational Fixed Stations, (h) Aviation and Marine Stations in the Radiodetermination Service, (i) Civil Air Patrol Stations, (j) Aeronautical Automatic Weather Observation Stations, (k) Aeronautical Advisory Stations (Unicom), and (l) Aeronautical Multicom Stations. We seek comment on whether any of the above services or classes of service¹⁵⁹ are more appropriately included in the competitive bidding process, however.

C. Common Carrier Radio Services

147. We propose to subject each of the common carrier radio services described below to competitive bidding and to employ the auction design procedures proposed in Part III above

¹⁵⁶ We note that in this service's spectrum, there could be both service to subscribers for compensation as well as "private" use (within the meaning of the legislative history of Section 309(j)). In our analysis of 800 MHz General Category channels, we tentatively decided to exclude those channels from competitive bidding because to do so would be contrary to Congress's expectations that virtually all private services would continue to be licensed as before. Therefore, we propose that POFS spectrum would not be subject to competitive bidding. We also believe that the POFS is exempt from competitive bidding because the principal use of the spectrum is for non-subscriber services. We seek specific comment on these matters. There are also a substantial number of mutually exclusive Multiple Address Service applications pending before the Commission which were filed prior to July 26, 1993. A substantial number of these applications were filed by federal government applicants as well as by applicants who would use these frequencies for "private service." Because we cannot be certain that the principal use of these frequencies is reasonably likely to involve the provision of service to subscribers, we tentatively conclude that these particular applications should not be subject to competitive bidding but request comment on our conclusion.

¹⁵⁷ Because our rules only permit not-for-profit cooperative sharing, as, for example, when several power companies share a single 800 MHz trunked system in the Power Radio Service, it appears that such systems do not have subscribers and are ineligible for competitive bidding under Section 309(j). Therefore, these types of frequencies, although exclusively assigned, should not be subject to competitive bidding. See 47 C.F.R. § 90.179, *In re Subparts M and S*, PR Docket No. 86-404, *supra*. We request comment on our tentative conclusion.

¹⁵⁸ PLMRS entities operating below 470 MHz (with the exception of 220 MHz providers, which are treated separately above) operate on shared spectrum, and therefore, there can be no mutual exclusivity among applications.

¹⁵⁹ We also note that in the majority of cases, the listed stations operate on shared spectrum, and therefore there can be no mutual exclusivity.

in licensing those services.¹⁴⁸ In each case, we believe that a competitive bidding system would promote the objectives of Section 309(j) of the Communications Act. We request that parties provide comment on whether each of these services should be subject to competitive bidding, specifically explaining the reasons for their conclusions with respect to each service. In addition, parties should address the merits of using the general auction procedures proposed in Part III to license each service. We also request parties to comment, on a service-specific basis, on whether other common carrier radio services should be subject to competitive bidding according to the Budget Act's criteria.

148. Multipoint Distribution Service (MDS). MDS is a one-way domestic public radio service rendered on microwave frequencies from a fixed station transmitting (usually in an omnidirectional pattern) to multiple receiving facilities located at fixed points. MDS includes both single-channel and multichannel stations.¹⁴⁹

149. We note that MDS applications were accepted for filing prior to July 26, 1993. Therefore, under the Budget Act, such mutually exclusive applications may be resolved by lottery rather than auction. We tentatively conclude that it would better serve the public interest to lottery the pre-July 26, 1993, MDS applications rather than subject them to competitive bidding to avoid further delay in granting MDS licenses. Those applications have already incurred substantial delays. To auction those licenses would further delay delivery of MDS service to the public because the auction rules will not be in effect for several months. We request comment on whether the Commission should auction, rather than lottery, the MDS applications accepted for filing prior to July 26, 1993.

150. Multichannel Multipoint Distribution Service (MMDS). MMDS consists of those multipoint distribution service channels that use the frequency band 2596 MHz to 2644 MHz (E-group and F-group channels) and associated response channels. MMDS is typically used to provide video entertainment programming to subscribers.¹⁵⁰ See note 5, *supra*.

151. We note that a significant number of MMDS applications were accepted for filing prior to July 26, 1993. Therefore, under the Budget Act, such mutually exclusive applications may be resolved by lottery rather than auction. We tentatively conclude that it would better serve the public interest to lottery the pre-July 26, 1993, MMDS applications, rather than subject them to competitive bidding to avoid further delay in granting MMDS licenses. Those applications already were subject to a freeze, and thus delayed. To auction those licenses would further delay delivery of MMDS service to the public because the auction rules will not be in effect for several months. We request comment on whether the Commission should auction, rather than lottery, the MMDS applications accepted for filing prior to July 26, 1993.

152. Local Multipoint Distribution Service (LMDS). LMDS is a proposed new service in a portion of the Ka-band (27.5-30.0 GHz) to provide a wide array of broadband terrestrial

¹⁴⁸ We recognize that some licensees in these services are permitted to operate on a non-common carrier basis. See, e.g., 47 C.F.R. § 21.900. Nevertheless, all initial applications in such services that satisfy the Budget Act's competitive bidding criteria would be subject to auctions.

¹⁴⁹ See 47 C.F.R. §§ 21.900-21.915 of the Commission's Rules concerning Multipoint Distribution Service.

¹⁵⁰ See *id.*

services, including multipoint video programming distribution, video telecommunications, and data services.¹⁶³

153. Fixed Satellite Services. The fixed-satellite service uses radio transmissions between authorized satellite space stations and fixed earth stations for common carrier and non-common carrier communications.¹⁶⁴

154. Mobile Satellite Service (MSS) Above 1 GHz. MSS consists of proposed satellite systems that will offer a range of voice and data mobile services in the 1610-1626.5/2483.5-2500 MHz (1.6/2.4 GHz) frequency bands. These services include two-way messaging service with interconnection to the public switched network, paging, facsimile and data messaging, and fleet surveillance and control services.

155. We note that a significant number of MSS applications above 1 GHz were accepted for filing prior to July 26, 1993. Therefore, under the Budget Act, such mutually exclusive applications may be resolved by either auction or lottery. We request comment on whether the Commission should auction, rather than lottery, the MSS applications accepted for filing prior to July 26, 1993.

156. Mobile Satellite Service (MSS) Below 1 GHz. MSS below 1 GHz includes non-voice, non-geo-stationary (NVNG) service. The NVNG service will offer an array of position location and data communication mobile satellite services utilizing non-geostationary satellite constellations. While current NVNG applications do not appear to be mutually exclusive, it is possible that mutually exclusive applications may be filed in the future. In the event that mutually exclusive applications are filed, we propose to subject the NVNG service to competitive bidding.

157. Point-to-Point Microwave Radio Service. Point-to-point microwave radio is a domestic public radio service rendered on microwave frequencies by fixed stations between points that lie within the United States, or between points to its possessions, or to points in Canada or Mexico. Point-to-point microwave has traditionally been used for basic telephone network services (voice, data, and video traffic), but more recently has often been used to interconnect cells of a cellular system.¹⁶⁵

158. Cellular Services. Cellular services, which are governed under Part 22 of the Commissions Rules, operate by dividing a large geographical service area into cells and assigning the same frequencies to multiple, nonadjacent cells. As a subscriber travels across the service area the call is transferred from one cell to another without noticeable interruption. Each cell is served by its own radio telephone and control equipment at a cell-site. All the cells in a system are connected to a Mobile Telephone Switching Office (MTSO) which, in turn, controls the switching between the Public Switched Telephone Network (PSTN) and the cell site.

¹⁶³ See Rule Making to Amend Parts 1 and 22 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service, CC Docket No. 92-297, 8 FCC Rcd 557 (1993).

¹⁶⁴ See 47 C.F.R. Part 25 of the Commission's Rules concerning Satellite Communications.

¹⁶⁵ See 47 C.F.R. §§ 21.700-21.711 of the Commission's Rules concerning the Point-to-Point Microwave Radio Service.

159. The U.S. and its possessions were divided into 734 cellular markets: 305 Metropolitan Statistical Areas (MSAs), 428 Rural Service Areas (RSAs), and the Gulf of Mexico Statistical Area (GMSA). Two cellular systems are licensed in each market on separate frequency blocks. Each initial cellular licensee in the MSAs and RSAs was given five years from the date of initial authorization to build and expand its system within its market.¹⁶⁶ The geographic area not covered by the licensee on each frequency block in each market is considered "unserved area." The Commission recently completed rules for accepting and processing applications for these unserved areas.¹⁶⁷

160. Approximately 10,000 unserved area applications were filed between March 10 and May 12, 1993; of these, approximately 9,000 mutually exclusive applications were filed for 83 systems.¹⁶⁸ Given the large number of applications filed prior to July 26, 1993 and the criteria described in Section 309(j), the Commission has the option of allowing these unserved area applications to be resolved by auction rather than by lottery. See Section 6002(c) (Special Rule). We believe that auctions for these pending applications would meet the statutory objectives. For example, the rapid deployment of new service, especially to rural areas, would be accomplished because insincere applicants who do not intend to build out their proposed systems but, rather, assign their authorization for profit, would be discouraged from competing in an auction. In addition, under some of the auction procedures proposed herein, auctions would provide more opportunity for a wider variety of applicants to become cellular licensees. Thus, we propose to auction, rather than lottery, unserved area applications filed prior to July 26, 1993 and seek comment on this proposal. We further propose to limit the opportunity to enter the auction for the unserved areas to those applicants who filed prior to July 26, 1993, and request comment on this approach. We also ask whether the Commission should allow full market settlements in these markets pending the decision of lottery or auction.¹⁶⁹

161. Public Paging Services. Public paging services are radio services in which common carriers are authorized to offer and provide paging service for hire to the general public. Paging service is the transmission of brief coded radio signals for the purpose of activating specific pagers; such transmissions may include brief messages and/or sounds.¹⁷⁰

162. Air-Ground Services. Air-ground services are radio services in which common carriers are authorized to offer and provide radio telecommunications services for hire to

¹⁶⁶ Rules for Rural Cellular Service, Second Report and Order, 2 FCC Rcd 2306 (1987), recon., 4 FCC Rcd 5377 (1989).

¹⁶⁷ Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing Applications for Unserved Areas in the Cellular Service, 6 FCC Rcd 6185 (1991), Second Report and Order, 7 FCC Rcd 2449 (1992), Third Report and Order, 7 FCC Rcd 7183 (1992), recon., 8 FCC Rcd 947 (1993).

¹⁶⁸ The Commission had scheduled two lotteries for some of these applications but subsequently postponed them pending evaluation of the provisions of the Budget Act and competitive bidding. See Lottery Notice, Mimeo No. 34917, Sept. 16, 1993.

¹⁶⁹ See discussion of prohibition of collusion, *supra*, at paras. 93-94.

¹⁷⁰ See 47 C.F.R. §§ 22.500-22.527 of the Commission's Rules governing Public Land Mobile Service.

subscribers in aircraft.¹⁷¹

163. Public Radiotelephone Services. Public radiotelephone services are radio services in which common carriers are authorized to offer and provide radiotelephone service for hire to the general public. Radiotelephone service generally is the transmission of sound from one place to another by means of radio, but in this context it refers to interconnection with the public telephone network in order to provide mobile telephone service. Common carrier radiotelephone services are either manual (operator assisted — provided in the high VHF 152-159 MHz spectrum) or automatic trunked (user-dialed — provided in the low UHF 454-459 MHz spectrum). The latter is sometimes called Improved Mobile Telephone Service or IMTS.¹⁷²

164. Offshore Services. Offshore services are radio services in which common carriers are authorized to offer and provide radio telecommunication services for hire to subscribers on structures in the offshore coastal waters of the Gulf of Mexico.¹⁷³

165. Rural Radio Services, including Basic Exchange Telephone Radio Systems (BETRS). Rural services are radio services in which common carriers are authorized to offer and provide radio telecommunication services for hire to subscribers in areas where it is not feasible to provide communication services by wire or other means. Rural services are either conventional rural radio services (provided in the VHF and UHF mobile spectrum), in which subscribers are essentially allowed to install and operate mobile telephone equipment at a fixed location for the purpose of obtaining interconnected service, or Basic Exchange Telephone Radio Systems (BETRS), in which a multiplexed digital radio link is used as the last segment of the local loop.¹⁷⁴

166. We seek comment on whether each of the radio services described above satisfies the criteria of the Budget Act for services subject to competitive bidding,¹⁷⁵ and whether competitive bidding for these services would promote the objectives specified in section 309(j)(3) of the Act.¹⁷⁶ We also seek comment on whether any safeguards to protect the public interest in the use of the spectrum would be appropriate with respect to particular services.¹⁷⁷

¹⁷¹ See 47 C.F.R. §§ 22.1100-22.1121 of the Commission's Rules on 800 MHz Air-Ground Radiotelephone Service. See also 47 C.F.R. §§ 22.521-22.523 of the Commission's Rules governing 454-459 MHz air-ground stations.

¹⁷² See 47 C.F.R. §§ 22.500-22.527 of the Commission's Rules concerning Public Land Mobile Service.

¹⁷³ See 47 C.F.R. §§ 22.1000-22.1008 of the Commission's Rules concerning Offshore Radio Service Telecommunications Service.

¹⁷⁴ See 47 C.F.R. §§ 22.600-22.610. Although we do not anticipate mutually exclusive applications for BETRS, provision of which is limited to local exchange carriers, BETRS uses the same channels as paging services, and therefore, there may be mutually exclusive applications seeking to use spectrum for both BETRS and paging.

¹⁷⁵ See para. 2, *supra*.

¹⁷⁶ See para. 3, *supra*.

¹⁷⁷ See para. 4, *supra*, and Section 309(j)(3).

V. Summary of Proposed Auction Procedures

167. We sketch out below how either an oral or a sealed bid auction might be conducted and seek comment on our proposed procedures. We anticipate that the Commission will engage an outside consultant or consultants to help the Commission conduct the auction process. These persons, who together with required Commission staff (hereinafter jointly referred to as the "Responsible Officials"), would prepare a Public Notice or Notices that would announce the particulars of upcoming auctions. We propose that there be a minimum of 90 days notice of each such auction.¹⁷⁸ The Public Notice would set forth what is to be auctioned, the time, place, and kind (e.g., oral vs. sealed bid) of auction that is to be held, the deposit requirements for that auction or auctions, including the amount of the upfront payment that the bidder must tender in advance to the Commission or bring with him or her to the auction to be allowed to bid, the address to which the application and related materials (including the sealed bid if the auction is a sealed bid auction) should be sent, as well as other identifying documents, the deadline for submission of applications, and any other relevant information.

168. At the same time that the Responsible Officials announce an upcoming filing window for an auction service by Public Notice, they would also indicate the availability of a bid package to interested parties. The bid package would identify the specific steps to be taken if the recipient wished to participate in the upcoming auction, including the filing of short-form and long-form applications with the Commission.¹⁷⁹ If the recipient wished to apply and participate in the auction, we propose that it file the applications (and any applicable fee) as provided in the Public Notice and register to bid at the same time by including written notice of the recipient's intention to bid. The short and long form applications and a proposed Notice of Intention to Bid (NIB)¹⁸⁰ would be sent to an address designated by the Responsible Officials to be received no later than a date indicated in the announcement.¹⁸¹ We propose that date would be at least 60 days prior to the auction date.

169. The NIB should indicate clearly on the top of the first page the auction to which the NIB relates. As suggested above, we propose that only one sealed bid per bidding party would

¹⁷⁸ In order to meet our statutory deadline to commence issuing PCS licenses and permits, we may adopt an expedited schedule for our initial PCS auctions. We seek comment on the absolute minimum necessary notice of an upcoming auction.

¹⁷⁹ We seek comment on whether the burden of storing applications might make it appropriate to require long-form applications to be filed on microfiche, as is done in the case of cellular applications.

¹⁸⁰ We propose to permit applicants to submit NIBs in letter form pending adoption and approval of the new form.

¹⁸¹ Applications and NIBs that were received after the deadline would be returned.

be allowed in a sealed bid auction,¹⁸² and each auction should have a separate sealed bid.¹⁸³ As part of the NIB, the prospective bidder would also provide to the Responsible Officials the name of the person who will be bidding on behalf of the applicant, if the applicant did not intend to bid personally.¹⁸⁴

170. The Responsible Officials would review the short-form application and associated documents to ensure that the application was acceptable for filing.¹⁸⁵ Application fee checks would be deposited immediately. We would use existing rules to determine whether to return fees in the event that applications are not acceptable for filing.¹⁸⁶

171. If the Responsible Officials determine after review of the short-form applications that more than one application is acceptable for filing and the prospective bidders are qualified to bid, they would so announce in a Public Notice issued at least 45 days prior to the auction.¹⁸⁷

¹⁸² We propose that anyone found to have submitted more than one bid for a single sealed bid auction be immediately disqualified from that auction and possibly from all future auctions as well. We request comment on this prophylactic measure.

¹⁸³ In the case of a group bid, of course, there could be more than one bid per auction: the group bid and a single sealed or oral bid for each individual license on which the bidder wished to bid.

¹⁸⁴ We propose that information on the identity of the bidder's agents not be made routinely available to the public. See 47 C.F.R. § 0.457(d). Some bidders' strategies may depend on bidding through different agents in different auctions.

¹⁸⁵ We have proposed that short-form applications be required to meet a letter-perfect standard in order to be accepted for filing and qualify the applicant to bid. We recognize that applicants may petition the staff for reconsideration and subsequently seek review of any action returning an application as not acceptable for filing. We propose to rule on all petitions for reconsideration prior to the relevant auction. In the event that the staff's denial of a petition is appealed, unless the full Commission has denied the appeal, the appellant will be permitted to participate conditionally in the auction. If the staff grants a petition for reconsideration, the applicant may participate notwithstanding a pending application for review filed by any other person. We propose to err on the side of leniency and allow, so much as possible, potential bidders to bid. If and when that bidder should win the auction, however, its application would be subject to further Commission review and perhaps to petitions to deny as well. Since we plan to keep the bidder's deposit if the petition to deny is successful or the winning bidder is otherwise found to be unqualified, the incidence of frivolous or ill-considered applications should be minimized. We request comment on this procedure and on any alternative procedures we might use when decisions concerning acceptability of applications are challenged.

¹⁸⁶ See 47 C.F.R. § 1.1101, *et. seq.*, and n. 90, *infra*.

¹⁸⁷ This would provide parties whose applications were not accepted for filing 30 days to file petitions for reconsideration and provide time for these petitions to be processed prior to the auction. We seek comment on whether, in the context of auctions only, we should shorten from 30 to 15 days the period within which such petitions for reconsideration may be filed. If we were to do so, then we would propose to announce auctions 75 days in advance, require applications to be submitted 45 days in advance, and issue the Public Notice listing qualified bidders 30 days in advance. Cf. paras. 167-169 and note 185, *infra*. If only one or no

The Responsible Officials might hold a preauction conference (at which bidder attendance would be voluntary) if they deemed it necessary. On the day of the auction, the bidder or its agent(s)¹⁰⁰ would appear at the auction room at least two hours prior to the auction, exhibit the applicant's notice from the Commission that its application is acceptable for filing and provide photographic identification of the party that will actually be bidding. If satisfied, the Responsible Officials would allow the bidders to enter that section of the auction room reserved for prequalified bidders.¹⁰¹ Those bidders and those bidders only would receive a bidding paddle so that they could bid.

172. The Responsible Officials would conduct an oral auction in accordance with the procedures proposed earlier. The auction would be videotaped and open to the public, although only prequalified bidders could bid. Under our preferred option, bidders would have already tendered their upfront payments to the Commission. If, however, we do not require bidders to tender their upfront payments in advance, the high bidder would be required to turn over its upfront payment immediately after determination of the high bid for that particular license. # If the Commission concludes that it is appropriate and practical to require immediate tender of an additional payment equal to the difference between 20 percent of the high bid and the upfront payment, the Responsible Officials would collect that payment, declare the high bidder the auction winner, and conclude the auction. We seek comment on the appropriate form of the additional payment. It should be in a form that is quickly transferrable and of high reliability (e.g., an additional cashier's check or checks, or perhaps, in the future, an electronic funds transfer). Failure to provide the full deposit at the auction would result in dismissal of the winner's relevant application(s) and the auctioneer would reopen the bidding to all remaining auction participants. The high bidder determined by this process who tenders the requisite upfront and deposit payments is the auction winner. The winner's payment(s) made at the auction would be immediately deposited. Once the winner's deposit has been verified, the Commission would then refund (without interest) the upfront payments of the other bidders. The Commission would then issue a Public Notice announcing the winner(s) of the auction(s) and would send a letter to the winner announcing its status as tentative winner of the license.

173. A sealed bid auction would function similarly to the oral bidding process described above with the following differences. First, a sealed bid envelope submitted shortly before the auction would contain a written statement of the amount bid for that auction. See para. 108,

applications are acceptable for filing, the auction would be cancelled, absent a subsequent reconsideration action; see note 91, infra.

¹⁰⁰ We envision, and propose, that bidders be allowed to bid through multiple bidding agents, although only one agent may bid for a single bidder in each auction. Each bidder or its agent, however, and his or her associated bid, if a sealed bid auction, must have been qualified by the Responsible Officials.

¹⁰¹ Although our preferred option, as described in paras. 102-109, is for bidders to tender their upfront payments in advance to the Commission, we also seek comment on only requiring bidders to exhibit their upfront payment cashier's checks when they arrive for the auction. Should we adopt this procedure, the Responsible Officials would examine but not collect the upfront payment checks prior to admitting bidders to the auction premises. Because validation of the upfront payment is a critical step in the bidding process, we propose to employ third party auditors to verify the fairness and accuracy of this process, at least in the beginning. If these upfront payments were received and deposited earlier, there would be no need to show these checks.

infra, where we propose to require submission of bids five days prior to the auction. We seek comment on where the sealed bid envelopes should be kept prior to the auction. Second, on the day of the auction, instead of having oral bids, the auctioneer would open the sealed envelopes in public, with the entire proceeding videotaped. Prior to the opening of any bids, bidders would have the opportunity to withdraw from the auction without penalty. At least two witnesses would observe the auctioneer opening the bid envelopes and would verify the amount of the various bids, all of which would be posted publicly.¹⁹⁰ The auctioneer would announce the name of the high bidder and the amount bid. At that point, the high bidder would have to tender its 20 percent deposit to the Commission,¹⁹¹ or suffer dismissal, in which case the Commission would keep the high bidder's upfront payment if it had already been tendered and select the second highest bidder.¹⁹²

174. The Commission would then review the entire application submitted by the auction winner. The application will be processed in accordance with normal rules applicable to the service under which the application was filed.¹⁹³ These would include, where applicable, the filing of petitions to deny against the auction winner.¹⁹⁴ As noted above, if the Commission were unable to grant the auction winner's application, the government would nonetheless retain the winner's deposit.

175. If the Commission granted the application, the grant would be conditioned upon the winning bidder providing, within a short period, such as 41 days,¹⁹⁵ a payment, via cashier's check¹⁹⁶ in an amount equal to the difference between the winning bid and the deposit.¹⁹⁷ Failure to comply with this deadline would result in automatic dismissal of the application with loss of

¹⁹⁰ As an alternative, we seek comment on whether to disclose only the two highest bids outstanding at any given time.

¹⁹¹ As described above, under our preferred option, bidders would have already tendered an upfront payment to the Commission, so the payment due from the high bidder at auction time would be the difference between 20 percent of the high bid and the upfront payment.

¹⁹² See paras. 120, 123-124 for a discussion of procedures for combinatorial bidding.

¹⁹³ See paras. 97, 100, *supra*. We seek comment on whether any of our normal processing rules should be modified in the context of auctions. For example, do any services have letter perfect standards that may be inappropriate for the long-form applications in this context?

¹⁹⁴ See paras. 110-112, *supra* for our discussion of alternative petition to deny filing schedules. We anticipate that this will be the point at which a licensee's qualifications or bona fides would be subject to review and challenge. See also H. R. Rep. No. 103-111 at 258.

¹⁹⁵ Parties may file petitions for reconsideration of a license grant or appeal to the courts or the Commission may on its own motion reconsider the grant of an application within 30 days after grant. See 47 C.F.R. §§ 1.106, 1.108; 47 U.S.C. § 402. If license grants are made under delegated authority, the Commission may review such grants on its own motion. 47 C.F.R. § 1.117, and applications for review may be filed.

¹⁹⁶ In addition, in the future, we may permit electronic funds transfers for such payments.

¹⁹⁷ A smaller or no payment would be due at this time by entities using installment payments.

the deposit.¹⁷⁶ Petitions for reconsideration or applications for review of a license grant would not stay the granting of the license. If on review, however, the court reversed the grant of the license, the bid amount less any upfront payment and deposit would be returned to the applicant. Alternatively, we ask whether there might be circumstances where the Commission would be required to return the full amount of the bid, including the deposit and upfront payment.¹⁷⁷ We seek comment on this procedure.

CONCLUSION

176. With this rule making, we enter new and uncharted territory. We believe that the competitive bidding process has the potential to improve significantly on the ways in which the Commission has formerly awarded licenses, but only if conducted skillfully and well. Due in part to the extremely short time within which the Commission must implement this complex legislation, it is unlikely that we have been able to propose a solution to or even foresee every possible problem or issue that could arise in the competitive bidding process. For that reason, it is more important than usual that commenters give serious and thoughtful consideration to the issues we have raised and to bring to our attention those which we may have overlooked.

Regulatory Flexibility Act

177. An Initial Regulatory Flexibility Analysis is contained in the Appendix to this Notice of Proposed Rule Making. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in the Appendix. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this Notice of Proposed Rule Making, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981).

Ex Parte Rules - Non-Restricted Proceeding

178. This is a non-restricted notice and comment rule making proceeding. Ex Parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. See generally 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

Comment Dates

179. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or

¹⁷⁶ We also seek comment on whether, rather than automatic dismissal of the application, the Commission should retain some discretion in this area.

¹⁷⁷ The Commission currently is unable to pay interest on upfront payments or deposits. See note 100, *supra*.

before November 10, 1993, and reply comments on or before November 24, 1993.²⁰⁰ To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the F.C.C. Reference Center of the Federal Communications Commission, room 239, 1919 M Street, N.W., Washington, DC 20554. The complete text of the Notice may be purchased from the Commission's copy contractor, International Transcription Service, 1919 M Street, Room 236, Washington, D.C. 20554, telephone (202) 857-3800.

Ordering Clause

180. Issuance of this Notice of Proposed Rule Making is authorized under the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, Section 6002, and Sections 4(i), 309(i), 303(i), and 309(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309(i), 303(i), and 309(r).

Contact Persons

181. For further information concerning this proceeding, contact Toni Simmons, Office of Plans and Policy, (202) 653-5940.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

²⁰⁰ In order to be considered in this proceeding, all previously filed comments # regarding auctions should be resubmitted. In addition, all previously filed petitions for rule making concerning competitive bidding that the petitioners believe have not been mooted by this proceeding should be refiled in order to be considered.

APPENDIX

As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals contained in this NPRM. We request written public comment on the IRFA, which follows. Comments must have a separate and distinct heading designating them as responses to the IRFA and must be filed by the comment deadlines provided above.

A. Reason for Action.

(i). This rule making proceeding is initiated to obtain comment regarding the implementation of a new Sections 309(i) and 309(j) of the Communications Act, as amended by the Omnibus Budget Reconciliation Act of 1993 (Budget Act).

B. Objectives.

(ii). The Commission seeks to implement changes to the Communications Act that, inter alia, provide the Commission with the authority to conduct auctions of electromagnetic spectrum, limit the Commission's authority to conduct lotteries and require certain anti-trafficking requirements in the context of lotteries. The Budget Act requires the Commission to complete this proceeding within 210 days of its enactment, or March 8, 1993.

C. Legal Basis.

(iii). The NPRM is authorized under the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, Section 6002, and Sections 2(a), 4(i), 303(r), 309(i) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 152(a), 154(i), 303(r), 309(i) and 309(j).

D. Reporting, Recordkeeping and Other Compliance Requirements.

(iv). The proposals under consideration in this NPRM include the possibility of new reporting and recordkeeping requirements for a number of small business entities.

E. Federal Rules Which Overlap, Duplicate or Conflict With These Rules

(v). None.

F. Description, Potential Impact, and Number of Small Entities Involved.

(vi). The rule changes proposed in this proceeding could affect small businesses if they have mutually exclusive applications for initial licenses or permits for a particular radio service accepted for filing by the Commission where the Commission has determined that, under Section 309(j), the particular spectrum is subject to competitive bidding. The NPRM proposes that mutually exclusive applications for licenses or permits in such radio services would be resolved by a system of competitive bidding rather than a system of random selection. In addition, the NPRM proposes certain anti-trafficking requirements in the context of lotteries. After evaluating the comments in this proceeding, the Commission will further examine the impact of any rule changes on small entities and set forth our findings in the Final Regulatory Flexibility Analysis.

G. Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives.

(vii). The NPRM proposes certain mechanisms of preferential treatment for small businesses, among other entities, to ensure economic opportunity, such as favorable financing or tax certificates

Separate Statement

of

Commissioner Andrew C. Barrett

Re: Implementation of Section 309(j) of the Communications Act:
Competitive Bidding.

This comprehensive notice of proposed rulemaking develops a variety of options for licensing commercial mobile services through competitive bidding. By necessity, the item must address the various intricacies and complexities of conducting an auction for various classes of commercial mobile services. I believe this Notice raises the proper questions in order to develop a full record for rules that will govern the competitive bidding of commercial mobile licenses. The questions in this notice highlight the interrelationship between implementing a competitive bidding scheme and fulfilling important public policy objectives under the Communications Act. I write separately to express my concern over the additional overlay of complexity contemplated by this item with respect to Personal Communications Services (PCS). Specifically, I am concerned about two aspects of this Notice as it pertains to PCS.

First, the item contemplates various schemes that are likely to enhance market aggregation schemes through group bidding. I am in favor of group bidding that could aggregate MTA's into nationwide licenses. Whether as a part of a consortia, or as individual entities bidding for an MTA license, the players in this context are likely to be equipped with sufficient resources. Thus my concern with respect to anticompetitive effects from group bidding by a small number of dominant players is mitigated by their ability to fully compete against each other for resources and capital.¹ I am more concerned about the potential abuses from a group bidding process in smaller markets such as the BTAs. This becomes especially problematic when spectrum is reserved for small business and rural telephone company participation. In this

¹ As I noted in my dissent to the PCS Second Report and Order, I would prefer three MTA licenses in this context, in order to ensure that more than the typical large telecommunications companies (i.e. interexchange carriers and the LECs) have an opportunity from the start to provide interoperable, viable competitive choices across the country. Under the current duopoly scheme for MTAs, I continue to be concerned that interexchange carriers and the LECs will be the dominant players in these licenses under a competitive bidding scenario. See In Re: Amendment of the Commission's Rules to Establish New Personal Communications Services, Second Report and Order, Gen. Reg. No. 90-114 (September 23, 1990) (Barrett, At Disposition 17).

context, small individual companies may find themselves unable to obtain a license through the competitive bidding process as long as there is a group bid that can always exceed the relative resources of individual small companies. While I understand that aggregation schemes are important, I am not sure that the playing field is necessarily equal where individual small businesses are forced in a "de facto" manner to join consortia in order to have any chance of obtaining a license through competitive bidding. It seems to me that public policy concerns for small business would provide a more equitable playing field in order to ensure a diverse source of participants who can win a competitive bid. By allowing group bids in the spectrum that might be reserved for small businesses, I am concerned that large interexchange carriers could stand behind the scenes, finance their selected small business throughout an area, and control a vast majority if not the entire number of spectrum bids for those licenses. If the intent of any reserved block for small businesses is to provide a variety of bidding opportunities on a relatively "equal playing field", I believe uncontrolled group bidding in these blocks may invite strategies that undermine this goal. Thus, I hope that various small business and rural telephone interests will address this issue thoroughly in the Notice. I do not want to see these groups effectively eliminated from the bidding process simply because they do not form large enough groups with deep pocket financiers. I look forward to reviewing comments on this issue.²

Second, I continue to be concerned about the additional complexity of aggregating several 10 MHz slivers of spectrum in order to get to a point where one can start a viable, economic PCS service. Given the lack of record on the economic viability of the 10 MHz PCS spectrum slivers above 2 GHz, I am concerned that bidders will be required to bid for at least two 10 MHz licenses before they can start any PCS service that will provide at least 70-80% coverage of BTAs in major markets. To the extent some of the individual 10 MHz allocations only provide coverage of 15-30% of an entire like Chicago, Los Angeles or Dallas, I am concerned that we have forced entities to bid for at least 2 licenses before

² I also encourage commenters to provide the Commission with various incentive proposals for including rural telephone companies and small businesses, including minority and women-owned businesses, in the ownership and operational structure of any consortia that bids for MTA licenses. Such incentives could include a percentage of deferred payment on a bid, tax certificates for the consortia investors, or enhanced credits on a bid. Given the likely strength of the broadband MTA licenses relative to the 5 other smaller BTA licenses, I wish to encourage inclusion of a diverse variety of parties in the ownership and operation of these MTA entities.

they can start a viable PCS service.³ Thus, while I am generally supportive of aggregation schemes across geographic areas (i.e. BTA's to MTA's or MTA's to nationwide), I continue to question the merit of requiring entities to aggregate across 10 Mhz spectrum licenses above 2 GHz in order to obtain a viable economic PCS license. This additional level of complexity, even in the auction context, appears to be an additional, unnecessary transaction cost, and creates the potential for uneconomic licenses from the start.⁴ I continue to believe these licenses should be offered in 20 MHz increments in order to provide viable, economic PCS opportunities from the start. Thus, I hope commenters, including small business and rural telephone companies, will address the interrelationship of the PCS order with the spectrum aggregation schemes contemplated by this Notice.⁵

I look forward to comments in this docket. I am interested in reviewing comments on the various issues raised by the Notice. Commenters should address the manner in which the attribution limits adopted in the PCS order for cellular and PCS licenses, effects the ability to bid in group licenses or as individuals. I also am concerned that the Commission receives appropriate consultation and advice on how to correctly conduct competitive bidding for commercial mobile services. Thus, parties who have experience in valuation of spectrum and competitive bidding processes are encouraged to participate in this record.

³ See In Re: Amendment of the Commission's Rules to Establish New Personal Communications Services, Second Report and Order, Gen. Dkt. No. 90-314 (September 23, 1993) (Commissioner Barrett, Dissenting Statement) at pp. 8, 9, n 15, n 16.

⁴ In addition, equipment availability and service interoperability standards will continue to be a significant dilemma under this scheme.

⁵ In addition, those entities desiring to aggregate 40 MHz should note the equipment and technical interoperability problems of aggregating across bands above and below 2 GHz.

